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# JURY TRIAL DISPARITIES BETWEEN CLASS ACTIONS AND SHAREHOLDER DERIVATIVE ACTIONS IN STATE COURTS

ANN M. SCARLETT\*

## *Abstract*

*Class actions and shareholder derivative lawsuits are both forms of representative litigation that historically had to be brought in the equity courts to be decided by a judge, rather than in the common-law courts to be decided by a jury. In 1938, the federal courts merged law and equity by passing the Federal Rules of Civil Procedure, which allowed both legal and equitable claims to be heard within the same civil action. After law and equity merged, the Supreme Court interpreted the Seventh Amendment's preservation of the right to jury trial as including not just actions recognized at common law, but also actions requiring resolution of legal rights. Thus, class and shareholder derivative actions brought in federal courts possess a right to jury trial for any legal claims.*

*Like the federal courts, almost all states have now merged law and equity. However, because the Seventh Amendment does not apply to the states, the right to jury trial in class and shareholder derivative actions varies among states. While a few states appear to deny any right to jury trial in both actions based on their historically equitable nature, some states now likely permit jury trials in both actions. The remaining states appear to recognize a jury trial right in class actions, but not in derivative actions. Unfortunately, most states have not clearly decided the right to jury trial for such actions. This Article surveys the states' treatment of the right to jury trial in these two forms of representative litigation. It argues that no basis exists for state courts to treat derivative actions differently from class actions as to the right to jury trial, and advocates that states should grant the right to jury trial to both actions.*

## *I. Introduction*

Imagine that the board of directors for a public corporation misrepresents the safety of its top-selling consumer product in its annual report by not disclosing that research studies show the product is unsafe, which helps

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\* Professor of Law, Saint Louis University. I want to thank Nicole Oelrich for her excellent research assistance in assembling an initial survey of states' treatment of the right to jury trial, and David Kullman for his assistance in updating that survey.

increase or maintain the corporation's share price. When consumers eventually discover the safety problem and the corporation's misrepresentations are revealed, the corporation will face a barrage of litigation. First, consumers will file class actions against the corporation for the harm caused to them by the product. Second, shareholders will file class actions against the corporation for securities law violations based on the misrepresentations that artificially inflated the share price. Third, shareholders will file shareholder derivative actions on behalf of the corporation against the corporation's directors and officers for breaches of their fiduciary duties. All three actions are based on the same core facts and may have overlapping legal claims. If the plaintiffs choose to file their class and shareholder derivative actions in federal court, those actions will possess a right to jury trial for any legal claims. If the plaintiffs choose to file such actions in state courts, however, the right to jury trial may not exist.

While the scenario above is hypothetical, both shareholder derivative and class actions arising from the same facts concerning a corporation are not rare.<sup>1</sup> For example, both shareholder derivative and class actions were filed regarding Wells Fargo's cross-selling tactics that occurred several years ago. In the shareholder derivative action filed on behalf of Wells Fargo, the shareholders sued Wells Fargo's directors and officers alleging they "knew or consciously disregarded that Wells Fargo employees were illicitly creating millions of deposit and credit card accounts for their customers, without those customers' knowledge or consent, . . . in an attempt to drive up 'cross-selling.'"<sup>2</sup> In the securities class action, the class of shareholders alleged Wells Fargo and several of its directors and officers made "repeated misrepresentations and omissions about a core element of Wells

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1. See, e.g., Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 84, 85 n.40 (2008) (describing both class and shareholder derivative actions for Martha Stewart Living Omnimedia, Inc. regarding Martha Stewart's alleged insider trading and for Taser International, Inc. regarding the safety of its products and its ability to meet sales goals).

2. *In re Wells Fargo & Co. S'holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1081–82 (N.D. Cal. 2017) (quoting Consol. Amended Verified S'holder Derivative Complaint ¶ 1); see also *id.* at 1088 (asserting claims against all defendants for breach of fiduciary duty, unjust enrichment, and securities law violations). Wells Fargo has agreed to a \$320 million settlement of this shareholder derivative action. Kevin Wack, *In a Twist, Wells Fargo Gets \$240M Payout in Latest Phony-Accounts Settlement*, AM. BANKER (Mar. 1, 2019, 6:53 PM EST), <http://www.americanbanker.com/news/in-a-twist-wells-fargo-gets-240m-payout-in-latest-phony-account-settlement> (explaining settlement totals \$320 million, including \$80 million in clawed back compensation from officers).

Fargo's business: its acclaimed "cross-selling" business model,' artificially inflating Wells Fargo's stock price."<sup>3</sup> In the consumer class action, Wells Fargo customers alleged the bank "had opened multiple accounts in [their] name[s] without [their] knowledge or consent."<sup>4</sup> Because these cases have either settled or settlement agreements are pending, the courts have not reached the right to jury trial issue. However, the plaintiffs chose to bring their class and derivative cases in federal court,<sup>5</sup> which would provide them with a right to jury trial for any legal claims in those cases.

Class actions and shareholder derivative lawsuits are both forms of representative litigation. A plaintiff files a class action on behalf of a putative class of which the plaintiff is a member, and the plaintiff represents herself and all the class members. A plaintiff files a shareholder derivative action on behalf of the corporation in which the plaintiff is a shareholder, and the plaintiff represents the corporation and all its shareholders. The plaintiffs in these representative cases may be able to file their lawsuit in federal court or in various state courts. Although many factors influence a plaintiff's choice of where to file a lawsuit,<sup>6</sup> the right to jury trial is a significant factor in the decision. Likewise, defendants may want to avoid courts that permit jury trials in representative litigation, because of a fear that a jury would favor the plaintiffs. Some corporations have attempted to adopt bylaw provisions requiring that any shareholder litigation be brought in a specified state court,<sup>7</sup> perhaps one that does not have the right to jury

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3. Hefler v. Wells Fargo & Co., No. 16-CV-05479-JST, 2018 WL 6619983, at \*1 (N.D. Cal. Dec. 18, 2018) (quoting ECF No. 207, ¶ 3) (citations omitted); *id.* at \*16–17 (certifying class for settlement and granting final approval of \$480 million proposed settlement).

4. Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC, 2017 WL 5157608, at \*2–3, \*9 (N.D. Cal. July 8, 2017) (certifying class for settlement purposes and preliminarily approving the \$142 million proposed settlement).

5. A separate shareholder derivative action was filed in California state court also, but was stayed. *In re Wells Fargo*, 282 F. Supp. 3d at 1089 (citing *In re Wells Fargo & Co. Derivative Litig.*, CGC 15–554407 (Cal. Super. Ct.)).

6. Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 345–46 (2006) (“[F]ive basic, and overlapping, types of decisionmaking considerations inherent in forum selection: (1) choices involving federal courts versus state courts; (2) choices involving courts in different states; (3) choices involving different substantive laws; (4) choices involving different procedural provisions; and (5) choices involving subjective and personal factors.”).

7. See, e.g., *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 937–39 (Del. Ch. 2013) (upholding validity of the forum selection bylaw, designating Delaware courts as the exclusive forum for shareholder litigation, that was adopted by the board of Chevron Corp., a Delaware corporation); see also *Drulias v. 1st Century Bancshares, Inc.*, 241 Cal. Rptr. 3d 843, 856 (Ct. App. 2018) (affirming an order staying a stockholder lawsuit

trial for representative litigation. Such attempts to gain an advantage arise from differences among courts in the United States as to the right to jury trial, which is a product of the right's complicated history.

When courts initially formed in the United States, they "were patterned on the English judicial system" of common-law courts and equity courts.<sup>8</sup> Historically, both class and shareholder derivative actions had to be brought in the courts of equity (also called the courts of chancery), where cases were decided by the judge (also called the chancellor).<sup>9</sup> Only cases allowed to be brought in the common-law courts possessed any right to jury trial, but those courts did not recognize representative litigation.<sup>10</sup> The federal courts in the United States merged law and equity with the 1938 adoption of the Federal Rules of Civil Procedure, which allowed both legal and equitable claims to be heard within the same civil lawsuit.<sup>11</sup> Almost all states have now similarly merged law and equity.<sup>12</sup>

In the 1970 *Ross v. Bernhard* opinion, the Supreme Court of the United States addressed the right to jury trial in shareholder derivative lawsuits filed in federal court following the merger of law and equity.<sup>13</sup> The Court has always interpreted the Seventh Amendment to the United States Constitution as protecting the right to jury trial that existed when the amendment was adopted in 1791.<sup>14</sup> Because derivative actions had to be brought in the equity courts in 1791, arguably no right to jury trial existed for derivative actions. However, the Court held that, with the merger of law and equity, "nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court."<sup>15</sup>

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on forum non conveniens grounds based upon enforcement of an exclusive Delaware forum selection bylaw).

8. Ann M. Scarlett, *Shareholders in the Jury Box: A Populist Check Against Corporate Mismanagement*, 78 U. CIN. L. REV. 127, 141 (2009).

9. *Id.* at 141–42.

10. *Id.*

11. See FED. R. CIV. P. 1–2, 18; see also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959) (explaining the same court may hear both legal and equitable claims in the same action under Federal Rules of Civil Procedure 1, 2, and 18).

12. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1018 & n.113 (2015) ("Delaware, Mississippi, and Tennessee retain at least some separate courts for equity."); Charles D. McDaniel, Jr., *First National Bank of Dewitt v. Cruthis: An Analysis of the Right to a Jury Trial in Arkansas After the Merger of Law and Equity*, 60 ARK. L. REV. 563, 567–68, 568 n.51 (2007) (same).

13. *Ross v. Bernhard*, 396 U.S. 531, 531–32 (1970).

14. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990).

15. *Ross*, 396 U.S. at 540.

It thus interpreted the preservation of the right to a jury trial in the Seventh Amendment as including not just actions recognized at common law, but also actions requiring resolution of legal rights.<sup>16</sup> To support its conclusion, the Court noted that, after the merger of law and equity, federal courts had regularly recognized a right to jury trial in class actions despite the historically equitable nature of class actions.<sup>17</sup>

*Ross v. Bernhard*, however, does not bind states because the Supreme Court has held the Seventh Amendment does not apply to the states.<sup>18</sup> Thus, each state has the freedom to establish its own right to jury trial within its constitution, by statute, or by case law. A few states continue to deny any right to jury trial in both class and derivative actions based on the historically equitable nature of such actions, while some states now permit jury trials based on the same reasoning as *Ross v. Bernhard*. Other states appear to recognize a jury trial right in class actions, but not derivative actions. Unfortunately, most states have not been clear in granting or denying jury trial rights for class and derivative actions. Indeed, the states' treatment of the right to jury trial in such actions must be gleaned from case law that often does not directly decide the issue.

This Article fills a gap in the current legal literature<sup>19</sup> by surveying how all fifty states treat the right to jury trial in class and shareholder derivative actions. This survey provides a roadmap for attorneys litigating such cases to utilize in understanding whether to demand a jury trial in their cases and provides precedents attorneys may cite in those states where jury trial rights are not clear. It may also assist attorneys in deciding where to file such actions.

For states appearing to allow jury trials in class actions but not in derivative actions, this Article then argues that these states should recognize no distinction between class and derivative actions regarding the right to jury trial. Virtually all states preserve a constitutional right to jury trial, and

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16. *See id.* at 540–41.

17. *Id.*

18. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 220 (1916); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 557 (1874) (holding Fourteenth Amendment does not extend the application of the Seventh Amendment to the states).

19. *See, e.g.*, DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 4:18 (2018) (discussing briefly the right to jury trial for derivative actions in fifteen states); Jean E. Maess, Annotated, *Right to Jury Trial in Shareholder's Derivative Action*, 32 A.L.R. 4th 1111 (2011) (same for eleven states but outdated); 13 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5990.10 (2018) (same for six states). These treatises are sometimes inaccurate. *See infra* text accompanying notes 231–34 (discussing Alaska).

that right should not be denied based on the specific procedural device by which the claim is raised. Whether a state grants or denies a right to jury trial, the choice should be the same for both class and derivative actions because both are forms of representative litigation. Accordingly, this Article seeks to help state judges, and perhaps legislators, understand the evolution of representative litigation when determining the right to jury trial in class and derivative actions.

Finally, this Article argues that a right to jury trial should be granted for legal claims in both class and shareholder derivative actions. These actions are no more complicated than other cases entrusted to juries for resolution. If state courts extend jury trial rights to both actions, litigants may have less incentive to forum shop. Most importantly, if the corporation in a shareholder derivative action or an individual member in a class action were to bring the action directly, those parties would have a right to jury trial for legal claims in all courts. Therefore, denying a jury trial when those claims are brought through representative litigation is unjust to the represented parties, who are the intended beneficiaries of such litigation.

## *II. The Right to Jury Trial in Class and Shareholder Derivative Actions*

Plaintiffs wanting to pursue a class or shareholder derivative action must choose the forum in which to file. Plaintiffs typically can file a class action in any state in which the defendants are subject to personal jurisdiction.<sup>20</sup> In shareholder derivative actions, plaintiffs can file in the state in which the corporation is incorporated or in any state in which the defendants are subject to personal jurisdiction.<sup>21</sup> Plaintiffs may also file class and derivative actions in federal court if the claim is based on a federal question<sup>22</sup> or if the requirements for diversity jurisdiction exist.<sup>23</sup> Each

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20. See David W. Ichel, *A New Guard at the Courthouse Door: Corporate Personal Jurisdiction in Complex Litigation After the Supreme Court's Decision Quartet*, 71 RUTGERS U. L. REV. 1, 38–39 (2018); see also Philip S. Goldberg et al., *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 DUKE J. CONST. L. & PUB. POL'Y 51, 76–78 (2019) (“Multi-state class actions can always be filed where a company is at home and is subject to general personal jurisdiction. Other states likely will not have jurisdiction over the entire class's claims.”).

21. See DEMOTT, *supra* note 19, § 4:14; 1 ROGER J. MAGNUSON, SHAREHOLDER LITIGATION § 9:8 (2018).

22. 28 U.S.C. § 1331 (2012).

23. *Id.* § 1332(a) (requiring citizens of different States and the amount in controversy exceed \$75,000); *id.* § 1332(d)(2)(A) (permitting class actions when one class member is diverse from one defendant); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546,

potential forum offers different perceived advantages and disadvantages, including different procedural rules.<sup>24</sup> In some forums, one of the advantages may be the right to demand a jury trial on any legal claims. However, a plaintiff must be able to discern whether a state grants a right to jury trial for legal claims in class and derivative actions before that factor can be considered. Similarly, a defendant must be able to ascertain the right to jury trial when sued in such an action because, in state and federal court, either party may choose to demand a jury trial on jury-triable issues.<sup>25</sup> If neither party properly demands a jury trial, the right to jury trial is typically waived.<sup>26</sup>

The law of the forum where the lawsuit is filed determines whether a right to a jury trial exists. When a plaintiff files a lawsuit in federal court under either federal question or diversity jurisdiction, the federal court applies its own rules of practice and procedure, which includes the right to jury trial.<sup>27</sup> Thus, under *Ross v. Bernhard*, a jury trial right exists for legal claims asserted in class and derivative actions in federal courts. Similarly, when a plaintiff files a lawsuit in state court, the state court applies its own rules of practice and procedure,<sup>28</sup> including whether there is a right to a jury trial in class or derivative lawsuits.<sup>29</sup>

Although the forum court's procedural rules apply, it is not necessarily the forum court's substantive law that will determine the merits of the lawsuit. For class actions based on state law, a state court will apply its own state's conflicts of law doctrine to determine the applicable state substantive law, which may be the law of another state or even the laws of multiple

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553–54 (2005) (explaining the Supreme Court has interpreted § 1332(a) to require complete diversity between plaintiffs and defendants).

24. See, e.g., FED. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1.

25. See FED. R. CIV. P. 38(b) (“On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and (2) filing the demand in accordance with Rule 5(d).”).

26. See, e.g., FED. R. CIV. P. 38(d). But see FED. R. CIV. P. 39(b) (“Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.”).

27. *Hanna v. Plumer*, 380 U.S. 460, 464 (1965).

28. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 127 (AM. LAW. INST. 1971) (“The local law of the forum governs rules of pleading and the conduct of proceedings in court.”); ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 242 (3d ed. 1977).

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 129 (“The local law of the forum determines whether an issue shall be tried by the court or by a jury.”).



states in some class actions.<sup>30</sup> For shareholder derivative claims, all state courts have adopted the internal affairs doctrine, which requires application of the substantive law of the corporation's state of incorporation.<sup>31</sup> When state law claims are filed in federal court, the federal court must apply the choice of law provisions of the state in which the federal court sits.<sup>32</sup> Thus, in a class action asserting state law claims, the federal court will apply the choice of law provisions of the state in which the federal court sits to determine the substantive state law that governs the merits. In a derivative action, because every state follows the internal affairs doctrine, the federal court will apply the substantive law of the corporation's state of incorporation.

*A. The Right to Jury Trial in Federal Courts*

The Seventh Amendment states that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>33</sup> Like the English judicial system, early courts in the United States included courts of common law and courts of equity. In the common-law courts, a jury trial was widely available for most of the legal claims commonly in use during the eighteenth century. In the equity courts, the judge administered equitable remedies without the assistance of a jury. The framers of the Seventh Amendment struck a compromise that preserved the right of trial by jury for those cases that were historically brought in the common-law courts.<sup>34</sup> The Seventh Amendment did not

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30. *See id.* §§ 145, 188.

31. *See, e.g.,* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) (“[T]he conflicts practice of both state and federal courts has consistently been to apply the law of the state of incorporation . . .”); *see also* Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) (“The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.”).

32. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (“The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts.”); *see also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”).

33. U.S. CONST. amend. VII; *see also* FED. R. CIV. P. 38(a) (“The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.”).

34. *See generally* HEBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 18–19 (1981) (discussing

extend any right to jury trial to those cases that were historically relegated to the equity courts.

Consistent with the language of the Seventh Amendment, the Supreme Court has adopted a historical test for determining whether a right to a jury trial exists for a specific claim. If a claim would have been within the jurisdiction of the common-law courts when the Seventh Amendment was adopted in 1791, then the claim possesses a right to jury trial.<sup>35</sup> For most claims, well-established historical patterns answer the question of the right to trial by jury. In 1791, the common-law claims included most money damages claims, trespass, ejectment, replevin, trover, conversion, and writs such as habeas corpus, mandamus, prohibition, and certiorari.<sup>36</sup> In 1791, the chancery courts heard the claims of plaintiffs seeking injunctive relief; specific performance, reformation, or rescission of contracts; accountings; and monetary relief when restitutionary or incidental to injunctive relief.<sup>37</sup> The chancery courts also heard the claims of plaintiffs who wanted to use a procedural device available only in equity, such as a derivative or class action.<sup>38</sup>

For claims created after 1791, the Supreme Court requires federal courts to examine whether the claim would have been brought in a common-law court or an equity court in 1791, and then whether the claim seeks a legal or equitable remedy.<sup>39</sup> Because the first inquiry is often inconclusive, the Court has stated the remedy sought is more important in determining whether a right to trial by jury exists.<sup>40</sup> If the case involves both legal and equitable claims, the Supreme Court has held the legal claims must be tried first by the jury, and then the judge rules on the equitable claims.<sup>41</sup> If a

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Seventh Amendment's adoption); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 668–705 (1973) (same).

35. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990); *see also* *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 834 (9th Cir. 1963).

36. STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, *CIVIL PROCEDURE* 617 (9th ed. 2016).

37. *Id.* at 618; 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2302 (3d ed. 1998).

38. *Ross v. Bernhard*, 396 U.S. 531, 541 (1970).

39. *Tull v. United States*, 481 U.S. 412, 417–18 (1987).

40. *Chauffeurs*, 494 U.S. at 565; *see also* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 47–48 (1989).

41. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962) (“Since these issues are common with those upon which respondents’ claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents’ equitable claims.”); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 507–08 (1959).

common factual issue exists between the legal and equitable claims, the judge is bound by the jury's factual finding on that issue.<sup>42</sup> In addition to legal claims, a right to jury trial exists for legal issues presented by the defendant's answer.<sup>43</sup>

Because common-law courts in 1791 did not allow shareholders to sue on behalf of a corporation, shareholders were forced to turn to the chancery courts to pursue a derivative suit "to enforce a *corporate* cause of action against officers, directors, and third parties."<sup>44</sup> Consequently, shareholder derivative actions were considered equitable regardless of whether the claims were legal or equitable.<sup>45</sup> Likewise, because courts of common law did not allow plaintiffs to join together as a class in 1791, class actions could be filed only in equity courts regardless of whether the claims were legal or equitable.<sup>46</sup>

In the 1970 *Ross v. Bernhard* decision, the Supreme Court reversed a Second Circuit decision that had held the Seventh Amendment's right to a jury trial did not extend to shareholder derivative actions because it was an action historically heard by equity courts.<sup>47</sup> The Supreme Court held that the merger of law and equity in the Federal Rules of Civil Procedure destroyed "[p]urely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity."<sup>48</sup> Because law and equity are now merged, the Court stated that "nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court."<sup>49</sup> Thus, the Court interpreted the Seventh Amendment's preservation of the right to a jury trial as including "not merely suits, which the *common* law recognized among its old and settled

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42. See *Beacon Theatres*, 359 U.S. at 510–11; see also *Blue Cross Blue Shield of Minn. v. Wells Fargo Bank*, 816 F.3d 1044, 1049 (8th Cir. 2016) ("Generally, where one party brings legal and equitable claims, the jury's factual determination is binding on the court's equitable determination."); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 965 (10th Cir. 2002) ("We have previously held that when legal and equitable issues to be decided in the same case depend on common determinations of fact, such questions of fact are submitted to the jury, and the court in resolving the equitable issues is then bound by the jury's findings on them.") (citing *Ag Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 730 (10th Cir. 2000)).

43. See FED. R. CIV. P. 38(a) – (b).

44. *Ross v. Bernhard*, 396 U.S. 531, 534 (1970).

45. *Id.* at 534–35.

46. *Id.* at 541.

47. *Id.* at 532–33.

48. *Id.* at 539–40.

49. *Id.* at 540.

proceedings, but suits in which *legal* rights were to be ascertained and determined . . . whatever may be the peculiar form which they may assume to settle legal rights.”<sup>50</sup>

The Court noted that despite the difficulty in defining the line between actions in law and equity, “a corporation’s suit to enforce a legal right was an action at common law carrying the right to jury trial at the time the Seventh Amendment was adopted.”<sup>51</sup> When a shareholder brought the same claim in a derivative suit in 1791, the shareholder was required to show that the corporation had a valid claim and that the directors refused to sue after the shareholder made a demand.<sup>52</sup> Thus, the Court described a derivative suit as having “dual aspects: first, the stockholder’s right to sue on behalf of the corporation, historically an equitable matter; second, the claim of the corporation against directors . . . on which, if the corporation had sued and the claim presented legal issues, the company could demand a jury trial.”<sup>53</sup> The Court explained that:

[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit. The claim pressed by the stockholder against directors or third parties “is not his own but the corporation’s.” . . . The proceeds of the action belong to the corporation and it is bound by the result of the suit. The heart of the action is the corporate claim. If it presents a legal issue, one entitling the corporation to a jury trial under the Seventh Amendment, the right to a jury is not forfeited merely because the stockholder’s right to sue must first be adjudicated as an equitable issue triable to the court.<sup>54</sup>

Thus, the Court held that after the judge decides the shareholder can proceed derivatively, a jury must decide any legal claims asserted on behalf of the corporation.<sup>55</sup>

The Court stated this holding was required by its prior decisions in *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood*.<sup>56</sup> In

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50. *Id.* at 533 (quoting *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830)).

51. *Id.* at 533–34 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*475).

52. *See id.*

53. *Id.* at 538.

54. *Id.* at 538–39 (quoting *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947)).

55. *See id.*

56. *Id.* at 539, 548–49.

those cases, the Court had held that the right to a jury trial is preserved even when legal and equitable claims are joined in the same case.<sup>57</sup> In such a case, “there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.”<sup>58</sup> The Court thought the same principle determinative of the question in derivative actions because “[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.”<sup>59</sup> Thus, if the shareholder has a right to sue on behalf of the corporation, the court examines the claim as if the corporation was the entity asserting it.<sup>60</sup> If the claim is one that historically entitled the corporation to a jury trial, the shareholder bringing the claim derivatively has a right to a jury trial.<sup>61</sup> “[I]t is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation’s spokesmen are its shareholders rather than its directors.”<sup>62</sup>

The Court also made clear that its reasoning in *Ross* applies to class actions as well as derivative actions. The Court noted that historically “the derivative suit and the class action were both ways of allowing parties to be heard in equity who could not speak at law,” but that a class action now may obtain a jury trial on any legal claims asserted by the class.<sup>63</sup> The right to a jury trial under the Seventh Amendment applies to the traditionally equitable class and shareholder derivative actions when the underlying claims present legal issues. The right to a jury trial does not depend on the character of the suit, but rather on the nature of the issues involved within

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57. *Id.* at 537–38 (“Under those cases, where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claim which must not be infringed . . .”).

58. *Id.* at 538.

59. *Id.*

60. *Id.*

61. *Id.* at 542 (“Given the availability in a derivative action of both legal and equitable remedies, we think the Seventh Amendment preserves to the parties in a stockholder’s suit the same right to a jury trial that historically belonged to the corporation and to those against whom the corporation pressed its legal claims.”).

62. *Id.* at 540.

63. *Id.* at 541 (citing *Montgomery Ward & Co. v. Langer*, 168 F.2d 182 (8th Cir. 1948); *Oskoian v. Canuel*, 269 F.2d 311 (1st Cir. 1959); *Syres v. Oil Workers Int’l Union, Local 23*, 257 F.2d 479 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); 2 WILLIAM W. BARRON & ALEXANDER HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 571 (Charles Alan Wright ed., 1961)).

the “ancient distinction between law and equity.”<sup>64</sup> As a result, federal courts must look to the true basis of the issues to distinguish between legal and equitable claims.<sup>65</sup> Therefore, a plaintiff in a derivative or class action generally possesses a right to a jury trial if the claim is one recognized as legal rather than equitable, or if the principal relief sought is monetary rather than equitable.

Most circuit courts have consistently applied *Ross v. Bernhard*. However, the Third Circuit has ruled that highly complex cases, specifically shareholder derivative suits, are an exception to the Seventh Amendment.<sup>66</sup> The Third Circuit argues that such an exception is allowed by a footnote in *Ross*,<sup>67</sup> which stated “the ‘legal’ nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, *the practical abilities and limitations of juries*.”<sup>68</sup> The Ninth Circuit refused to apply this rationale, determining that “[a]fter employing an historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote.”<sup>69</sup> The Ninth Circuit also noted the Supreme Court has considered Seventh Amendment issues on several occasions since *Ross v. Bernhard*,

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64. *Fabrikant v. Bache & Co. (In re U.S. Fin. Sec. Litig.)*, 609 F.2d 411, 422 (9th Cir. 1979).

65. *Id.* at 422 (“The right to jury trial does not depend on the character of the overall action but instead is determined by the nature of the issue to be tried.”) (citing *Ross*, 396 U.S. at 538); see *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962) (“Since these issues are common with those upon which respondents’ claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents’ equitable claims.”).

66. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp (In re Japanese Elec. Prods. Antitrust Litig.)*, 631 F.2d 1069, 1089 (3d Cir. 1980); see also *Ross*, 396 U.S. at 550 (Stewart, J., dissenting) (“[T]here are, for the most part, no such things as inherently ‘legal issues’ or inherently ‘equitable issues.’ There are only factual issues, and, ‘like chameleons [they] take their color from surrounding circumstances.’ Thus the Court’s ‘nature of the issue’ approach is hardly meaningful.”) (quoting Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 692 (1963)); see also George K. Chamberlin, Annotation, *Complexity of Civil Actions as Affecting Seventh Amendment Right to Trial by Jury*, 54 A.L.R. FED. 733, § 3(a) (1981) (providing a summary of cases where courts considered the complexity of a case to bar jury trial).

67. See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d at 1079; see also *Scott v. Woods*, 730 P.2d 480, 485–86 (N.M. Ct. App. 1986).

68. *Ross*, 396 U.S. at 538 n.10 (emphasis added) (citing Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963)).

69. *In re U.S. Fin. Sec. Litig.*, 609 F.2d at 425.

but has never considered the practical abilities and limitations of juries.<sup>70</sup> No other circuit court has adopted the Third Circuit's complexity exception to the Seventh Amendment,<sup>71</sup> and the Supreme Court, in considering Seventh Amendment questions since *Ross*, has never considered juries' abilities in determining whether a right to trial by jury exists.

*B. The Right to Jury Trial in State Courts*

The Supreme Court has held that the Seventh Amendment does not apply to the states.<sup>72</sup> Therefore, *Ross v. Bernhard* does not bind state courts. Whether a class or shareholder derivative action filed in state court has a right to a jury trial depends on each state's law. The following subsections roughly categorize states into three categories: (1) states that likely deny

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70. *Id.* at 426 & n.48 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977); *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, 415 U.S. 189 (1974); *Colgrove v. Battin*, 413 U.S. 149 (1973)); *see also* *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478–79 (1962) (holding an accounting claim is legal for jury trial purposes because the availability of masters to assist the jury removed the historical reason for referring such claim to equity and judge).

71. *See* *Perry v. TRW Elec. Prods., Inc.*, No. 90-1160, 1991 WL 125161, at \*2 n.3 (10th Cir. July 9, 1991) (providing examples of complex issues that juries are capable to handle); *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1130 (Fed. Cir. 1985) ("We discern no authority and no compelling need to apply in patent infringement suits for damages a 'complexity' exception denying litigants their constitutional right under the Seventh Amendment."); *Phillips v. Kaplus*, 764 F.2d 807, 814 & n.6 (11th Cir. 1985) (rejecting a complexity exception and noting the Supreme Court's failure to evaluate such an exception in cases post *Ross*); *Soderbeck v. Burnett Cty.*, 752 F.2d 285, 289 (7th Cir. 1985) ("Rightly or wrongly, our system commits the decision of complex as well as simple facts . . . to the jury in cases in which a right to a jury trial is given."); *N.Y.C. v. Pullman Inc.*, 662 F.2d 910, 919–20 (2d Cir. 1981) ("Assuming *arguendo* that a 'complexity exception' might be appropriate in some cases-and we emphatically do not suggest that there is or should be such an exception-we hold here that such an exception would not have been appropriate since the jury was merely asked to determine whether a group of non-scientists acted in a rational manner."); *Cotten v. Witco Chem. Corp.*, 651 F.2d 274, 276 (5th Cir. 1981) ("If there is such a thing as a complexity exception to the Seventh Amendment, it cannot be applied where it would merely be 'most difficult, if not impossible, for a jury to reach a rational decision.'"); *In re U.S. Fin. Sec. Litig.*, 609 F.2d at 432 ("[W]e believe that any test which is dependent upon the complexity characterization of a case would be too speculative to be susceptible of any type of practical application."); *cf.* *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 908 S.W.2d 104, 109 (Ky. 1995) ("An argument which authorizes complexity as a basis for constitutionally removing a case from a jury enjoys no support. Complexity was not an equitable basis for a trial without a jury at the time of the adoption of Kentucky's Constitution and to deny a jury trial is to speculate on a jury's capabilities.").

72. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 220 (1916).

any right to jury trial in both shareholder derivative and class actions (including one state that does not recognize class actions); (2) states that likely grant a right to jury trial in both types of actions; and (3) states that appear to grant a right to jury trial in class actions, but not in derivative actions.

As the discussion below demonstrates, the law in many states (within all three categories) remains unclear as to whether a right to jury trial exists in shareholder derivative or class actions. No clear legal authority exists because, often, no court in the state has specifically addressed the issue. In many states, case law may reflect that jury trials have been held in individual derivative or class actions, but without any specific discussion or analysis of the jury trial issue. Without clear precedent on the jury trial issue, litigants have no certainty that a state court will grant a jury trial for legal issues in future class or derivative actions. When a jury trial is held for legal claims in a class or derivative action, it suggests that the state grants a right to jury trial, because parties cannot agree to have a jury trial when no such right exists. However, in some states, a trial court hearing claims in equity may have discretion to allow an advisory jury to hear those claims, but it is often difficult to glean whether the jury trial was discretionary when the issue is not directly addressed in an appellate opinion.

*1. States Appearing to Deny Any Right to Jury Trial in Either Class or Shareholder Derivative Actions*

Contrary to the reasoning of *Ross*, ten states appear to deny any right to a jury trial in shareholder derivative actions because such actions were historically filed in equity courts. These states also seem to deny jury trial rights in class actions for the same reason, although often without explanation. Except for Mississippi, these states have merged law and equity to allow one lawsuit to present both legal and equitable claims, yet continue to deny any right to a jury trial for shareholder derivative and class actions.

The Idaho Constitution preserves the right to jury trial as it existed when the state constitution was adopted.<sup>73</sup> In *Morton v. Morton Realty Co.*, the Idaho Supreme Court stated that the applicable constitutional provision does not refer to equitable actions<sup>74</sup> and expressly held no right to jury trial exists for shareholder derivative actions since such actions could be brought

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73. IDAHO CONST. art. I, § 7 (“The right of trial by jury shall remain inviolate . . .”).

74. 241 P. 1014, 1015–16 (Idaho 1925); *see also* *Coeur d’Alene Lakeshore Owners & Taxpayers, Inc. v. Kootenai Cty.*, 661 P.2d 756, 762–63 (Idaho 1983).



only in equity.<sup>75</sup> In the more recent case of *Weatherhead v. Griffin*, a jury tried an action by a shareholder asserting both individual (direct) and derivative claims, and the Idaho Court of Appeals affirmed the jury verdict awarding damages on the derivative claim without questioning whether a jury trial was proper.<sup>76</sup> However, given that the direct claims were entitled to a jury trial, the trial court may have been exercising its discretion to allow the entire case to be tried to the jury. Idaho has not clearly addressed a right to jury trial in class actions, and scant precedent exists. In 1982, the Idaho Supreme Court affirmed a denial of jury trial in a class action because no jury trial right existed at common law for a taxpayers' refund action, but it did not comment on the class action status.<sup>77</sup> More recently, the Idaho Supreme Court found a demand for jury trial in a class action untimely, which may suggest that a jury trial would have been proper if timely demanded.<sup>78</sup>

Indiana preserves the right to jury as it existed at common law in 1852, which means that no right to jury trial exists for equitable claims.<sup>79</sup> "To determine if equity takes jurisdiction of the essential features of a suit, . . . [c]ourts must look to the substance and central character of the complaint, the rights and interests involved, and the relief demanded."<sup>80</sup> Indiana does not appear to recognize a right to jury trial in derivative actions. The Indiana Court of Appeals in *Griffin v. Carmel Bank & Trust Co.* expressly held that "[a] derivative action is always in equity even though the only relief available is damages and the corporation could have maintained an action at law."<sup>81</sup> While two years later a jury trial was held in a shareholder derivative action, the Indiana Court of Appeals reversed that jury verdict

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75. *Morton*, 241 P. at 1016–17.

76. 851 P.2d 993, 1000–01 (Idaho Ct. App. 1992).

77. *Coeur d'Alene*, 661 P.2d at 762–63.

78. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 111 P.3d 73, 81–82 (Idaho 2005), *overruled on other grounds*, *Farber v. Idaho State Ins. Fund*, 272 P.3d 467, 469 (Idaho 2012) (overturning on application of statute of limitations).

79. *Songer v. Civitas Bank*, 771 N.E.2d 61, 63–64 (Ind. 2002); *see also* IND. CONST. art. I, § 20 ("In all civil cases, the right of trial by jury shall remain inviolate."); *Arnold v. Dirrim*, 398 N.E.2d 426, 438 (Ind. Ct. App. 1979) (denying a jury trial in a class action by stockholders because class seeking only equitable remedies of rescission of its stock purchases and restitution of the purchase price paid).

80. *Songer*, 771 N.E.2d at 68.

81. 510 N.E.2d 178, 183 (Ind. Ct. App. 1987) (citing 13 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5944); *see also* *G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 243–44 (Ind. 2001) ("The shareholder derivative action is a creature of equity.") (citing *Griffin*, 510 N.E.2d at 183).

because the shareholders did not have standing as shareholders in the newly merged corporation.<sup>82</sup> Although the court's opinion did not address the propriety of a jury trial, doing so was not necessary given the lack of standing, so the case likely could not be used to support a right to jury trial in derivative actions. Likewise, no precedent in Indiana has expressly recognized a right to jury trial in class actions. In *Kellogg v. City of Gary*, a jury tried a class action by citizens alleging improper handgun registration, but the Indiana Supreme Court vacated the judgment for statutory non-compliance without addressing whether a jury trial in a class action was proper.<sup>83</sup>

It is unclear whether Maine recognizes a right to jury trial in shareholder derivative or class actions. The Maine Supreme Court has held that the Maine Constitution preserves the same right to jury trial that existed in 1820.<sup>84</sup> The court has further stated that a right to jury trial exists for legal claims but not equitable claims, and that to determine whether a claim is legal or equitable a court looks at the "basic nature of the issue presented, including the relief sought."<sup>85</sup> This direction to look at the issue and the remedy might suggest that a court is not to consider the historically equitable nature of a class or derivative action, but the survey did not reveal any class or derivative action tried by a jury in Maine.<sup>86</sup>

Mississippi maintains separate courts of law and equity.<sup>87</sup> While the Mississippi Constitution preserves the right to a jury trial,<sup>88</sup> the Mississippi Supreme Court has interpreted the right to jury trial to apply only to the

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82. U.S. Fid. & Guar. Co. v. Griffin, 541 N.E.2d 553, 554–55 (Ind. Ct. App. 1989).

83. 562 N.E.2d 685, 689–90, 706 (Ind. 1990); *see also Arnold*, 398 N.E.2d at 438–39 (finding no right to jury trial for plaintiff class seeking rescission of its stock purchases and restitution of the purchase price paid, because rescission is an equitable remedy).

84. *DesMarais v. Desjardins*, 664 A.2d 840, 844 (Me. 1995); *see also* ME. CONST. art. I, § 20 ("In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced . . .").

85. *DesMarais*, 664 A.2d at 844 (quoting *Cyr v. Cote*, 396 A.2d 1013, 1016 (Me. 1979)).

86. *But see* *Millett v. Atl. Richfield Co.*, No. CV-98-555, 2000 WL 359979, at \*19 (Me. Super. Ct. Mar. 2, 2000) (denying class certification in action seeking monetary damages for contamination of well water but suggesting a right to jury trial may exist when "concerned by the prospect of binding a large class of Mainers to the decisions of one court and one jury").

87. MISS. CONST. art. VI, §§ 152–154, 159–164.

88. *Id.* art. III, § 31 ("The right of trial by jury shall remain inviolate . . .").

circuit court, while a jury trial is generally discretionary in chancery court.<sup>89</sup> “[I]t is more appropriate for a circuit court to hear equity claims . . . since circuit courts have general jurisdiction but chancery courts enjoy only limited jurisdiction,’ especially in light of the fact that it is in circuit court that the constitutional right to a jury trial is preserved.”<sup>90</sup> Research revealed no shareholder derivative action in which legal claims were tried to a jury, because the Mississippi Supreme Court has stated that “a true stockholder derivative action is a suit in equity which confers jurisdiction on the chancery court.”<sup>91</sup> Mississippi currently does not recognize class actions in circuit or chancery court.<sup>92</sup>

Montana generally preserves the right to jury trial as it existed at common law in 1889,<sup>93</sup> which suggests that the historically equitable derivative and class actions may not possess any right to jury trial. Research did not uncover any derivative action tried to a jury, and the Montana Supreme Court has held that a stockholder derivative action “is an invention of the courts of equity and is recognizable only in equity.”<sup>94</sup>

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89. *Union Nat’l Life Ins. Co. v. Crosby*, 2002–IA–01751–SCT (¶ 26) (Miss. 2004), 870 So. 2d 1175, 1181–82; *see also* MISS. CONST. art. 6, § 159 (“The chancery court shall have full jurisdiction in the following matters and cases, viz.: (a) All matters in equity; . . . (f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation.”); *see also id.* art. 6, § 162 (“All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court.”).

90. *Era Franchise Sys., Inc. v. Mathis*, 2005–IA–00350–SCT (¶ 13) (Miss. 2006), 931 So. 2d 1278, 1283 (quoting *Union Nat’l Life*, ¶ 24, 870 So. 2d at 1182).

91. *Id.* ¶ 11, 931 So. 2d at 1282 (concluding plaintiff was “pursuing a direct legal action rather than a true shareholder’s derivative action” and remanded with instructions to transfer the case to circuit court).

92. *USF&G Ins. Co. of Miss. v. Walls*, 2002–IA–00185–SCT (¶ 24) (Miss. 2005), 911 So. 2d 463, 468 (en banc) (“Accordingly, as we have not made a rule which provides for class actions, they are not a part of Mississippi practice—chancery, circuit, or otherwise.”); *see also* *Kinney v. Catholic Diocese of Biloxi, Inc.*, 2012–CA–01782–SCT (¶ 17) (Miss. 2014), 142 So. 3d 407, 414 (“[T]here is no class-action rule in Mississippi state courts that would allow Plaintiffs to make claims and arguments on behalf of parties not before the court.”).

93. MONT. CONST. art. II, § 26; *see also In re C.L.A. & J.A.*, 685 P.2d 931, 933 (Mont. 1984) (“The rule in Montana is that our state constitution only guarantees the right to a jury trial in the class of cases in which the right was enjoyed when the constitution was adopted.”) (citing *Mont. Ore Purchasing Co. v. Mont. Consol. Copper & Silver Mining Co.*, 70 P. 1114 (Mont. 1902); *State ex rel. Jackson v. Kennie*, 60 P. 589 (Mont. 1900)).

94. *Ski Roundtop, Inc. v. Hall*, 658 P.2d 1071, 1082 (Mont. 1983) (citing *Noble v. Farmers Union Trading Co.*, 216 P.2d 925, 930 (Mont. 1950)).

Although Montana has a rule permitting class actions,<sup>95</sup> the survey found no case permitting trial by jury in a class action.

The Nebraska Constitution states, “The right of trial by jury shall remain inviolate . . . .”<sup>96</sup> The Nebraska Supreme Court looks to an action’s essential character and the remedy sought to determine whether the claim is legal or equitable, and thus whether a right to jury trial existed in 1875.<sup>97</sup> A court sitting in equity has discretionary power to submit issues of fact to a jury for determination.<sup>98</sup> In a 1944 case, the Nebraska Supreme Court expressly held that a shareholder derivative action, even where the only recovery sought is damages, could not be brought as an action at law but only as an action in equity.<sup>99</sup> The survey found no other shareholder derivative case discussing the jury trial issue and no direct precedent for a right to jury trial in class actions. In *Doyle v. Union Insurance Co.*, insurance policy holders alleged directors of a dissolved corporation “breached their fiduciary duties to the policyholders.”<sup>100</sup> Had the corporation not been dissolved, the court stated the suit would have been a shareholder derivative action for the benefit of the corporation and thus an equitable action.<sup>101</sup> Instead, the case was brought as a class action on behalf of all policyholders seeking equitable relief and damages,<sup>102</sup> and the Nebraska Supreme Court held the suit was equitable.<sup>103</sup> While the trial “court considered a reference of some factual issues for determination by a jury which it has the discretionary power to do in equity cases,” the court did not do so because “all parties waived the proffered jury trial on such issues.”<sup>104</sup> Because the jury trial offered was discretionary, *Doyle* does not support a right to jury trial in class actions.

The North Dakota Constitution provides, “The right of trial by jury shall be secured to all, and remain inviolate . . . .”<sup>105</sup> The North Dakota Supreme Court has stated that the right to jury trial is preserved as it existed when the state constitution was adopted and thus “[t]rial by jury belongs to the

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95. MONT. R. CIV. P. 23.

96. NEB. CONST. art. I, § 6.

97. State *ex rel.* Cherry v. Burns, 602 N.W.2d 477, 482–83 (Neb. 1999).

98. Doyle v. Union Ins. Co., 277 N.W.2d 36, 39 (Neb. 1979).

99. Rettinger v. Pierpont, 15 N.W.2d 393, 397–98 (Neb. 1944).

100. Doyle, 277 N.W.2d at 39.

101. *Id.*

102. *Id.* at 38.

103. *Id.* at 39.

104. *Id.*

105. N.D. CONST. art. I, § 13.

common law and not to the equity side of the court.”<sup>106</sup> In addition, the right to jury trial is determined by looking at the character of the issues pleaded.<sup>107</sup> The survey did not reveal direct precedent supporting a right to jury trial in shareholder derivative or class actions. In *Schumacher v. Schumacher*, the North Dakota Supreme Court held the trial court erred by deciding the equitable shareholder derivative claims before holding a jury trial on the minority shareholders’ direct claims.<sup>108</sup> The court remanded for a new jury trial and stated “the jury must be allowed to decide disputed fact issues unhampered by preemptive trial court findings on those issues.”<sup>109</sup> However, because the court ordered that the minority shareholders be allowed to present their direct claims to a jury in the new trial, *Schumacher* does not support a right to jury trial for derivative claims.

The Rhode Island Constitution preserves the right to trial by jury as it existed at common law when the constitution was adopted in 1842.<sup>110</sup> The Rhode Island Supreme Court has directed that “the historical nature of the claim” must be examined to determine whether a jury trial right exists,<sup>111</sup> which suggests no right to jury trial for the historically equitable derivative and class actions. No clear precedent in Rhode Island has recognized a jury trial right in derivative actions. In *A. Teixeira & Co., Inc. v. Teixeira*, the state supreme court reversed the jury verdict in a shareholder derivative action because a directed verdict should have been entered for the defendants, but it did not question whether a jury trial was proper.<sup>112</sup> Thus,

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106. *Gen. Elec. Credit Corp. v. Richman*, 338 N.W.2d 814, 817 (N.D. 1983); *see also* *Prod. Credit Ass’n of Minot v. Melland*, 278 N.W.2d 780, 787–88 (N.D. 1979) (“The provision in our Constitution that right of trial by jury shall remain inviolate neither enlarges nor restricts that right, but merely preserves it as it existed at the time of the adoption of our Constitution. Where the Constitution preserves the right of trial by jury in general terms, as our Constitution does, it preserves it for all cases in which it could have been demanded as a matter of right at common law.”) (quoting *Rinvinius v. Huber*, 24 N.W.2d 911 (N.D. 1946)).

107. *Gen. Elec.*, 338 N.W.2d at 817–18; *see also* *Prod. Credit Ass’n*, 278 N.W.2d at 788 (“This right to a trial by jury is determined by the character of the issues as framed by the complaint.”).

108. 469 N.W.2d 793, 800 (N.D. 1991).

109. *Id.*

110. *Egidio DiPardo & Sons, Inc. v. Lauzon*, 708 A.2d 165, 171 (R.I. 1998); *see also* R.I. CONST. art. I, § 15 (“The right of trial by jury shall remain inviolate.”); *Dalo v. Thalmann*, 878 A.2d 194, 199 (R.I. 2005) (noting the state constitution “insures that issues which were formerly triable at law as of right to a jury are still triable in that fashion, and that those which . . . were considered equitable shall be triable by the court.”) (quoting *Rowell v. Kaplan*, 235 A.2d 91, 96 (R.I. 1967)).

111. *Egidio DiPardo*, 708 A.2d at 171.

112. 699 A.2d 1383, 1384, 1388 (R.I. 1997).

*Teixeira* provides a weak basis for arguing a right to a jury trial exists in derivative actions. The survey found no case conclusively addressing the right to jury trial in class actions. When the plaintiff in one class action attempted to argue that class actions were always equitable in nature, the Rhode Island Supreme Court stated class actions may include actions at law, but ultimately held the issue waived for lack of adequate briefing by plaintiff.<sup>113</sup>

Vermont likely does not recognize a right to jury trial in derivative or class actions. The Vermont Supreme Court has held that the state “Constitution . . . guarantees the right to jury trial ‘to the extent it existed at common law’” when the state constitution was adopted in 1793.<sup>114</sup> For causes of action created after 1793, the court looks at the nature of the action and “its fitness to be tried by a jury” to determine whether there is right to trial by jury.<sup>115</sup> Given the historically equitable nature of class and derivative actions in 1793, no right to jury trial likely exists for such actions in Vermont<sup>116</sup> and the survey found no class or shareholder derivative action tried to a jury.

In Virginia, only legal claims possess a constitutional right to jury trial<sup>117</sup> but a court may use an advisory jury for equitable claims.<sup>118</sup> The Virginia Supreme Court has held that shareholder derivative actions are actions “in

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113. *Berberian v. New England Tel. & Tel. Co.*, 369 A.2d 1109, 1113–14 (R.I. 1977). *But see* *Allen v. Griffin*, No. M.P. 8877, 1975 WL 169932, at \*1 (R.I. Super. Ct. Jan. 17, 1975) (noting parties in a class action waived their right to a jury trial).

114. *State v. Irving Oil Corp.*, 2008 VT 42, ¶ 5, 955 A.2d 1098, 1101 (quoting *Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122, 1125 (Vt. 1992)); *see also* VT. CONST. ch. I, art. 12 (“That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.”).

115. *Irving Oil*, 2008 VT 42, ¶ 6, 955 A.2d at 1101 (quoting *Plimpton v. Town of Somerset*, 33 Vt. 283, 292 (1860)).

116. *But see* *Duggan v. Eugene*, No. 114-5-98CACV, slip op. at 24, 2004 WL 5696899 (Vt. Super. Ct. Feb. 19, 2004) (ordering parties to file “statement of all issues which that party believes can, and should be addressed on a class-wide basis, at the ‘Phase I’ jury trial” in a class action by used mobile home purchasers against park owners, but case never went to trial).

117. *See* *Norfolk S. Ry. Co. v. E.A. Breeden, Inc.*, 756 S.E.2d 420, 426 (Va. 2014); *see also* VA. CONST. art. I, § 11 (“That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.”).

118. VA. CODE ANN. § 8.01-336(E) (West 2019); *cf.* *Rogal v. Hughes & Smith, Inc.*, No. 131757, 1994 WL 1031484, at \*1, \*3–4 (Va. Cir. Ct. Dec. 30, 1994) (sitting in equity, the circuit court held a jury trial for issues in a class action by limited partners of a club, but the court rejected the jury’s verdict suggesting it viewed the jury’s verdict as advisory).

equity and may not be brought on the law side of the court.”<sup>119</sup> While case law has suggested class actions might be entertained in equity,<sup>120</sup> Virginia does not currently authorize class actions by statute or rule.<sup>121</sup> Thus, Virginia likely does not recognize a right to jury trial in derivative or class actions, and the survey found no precedent supporting such a right.

*2. States Appearing to Grant a Right to Jury Trial in Both Class and Shareholder Derivative Actions*

By contrast, eighteen states appear to recognize a right to jury trial in shareholder derivative actions based on *Ross v. Bernhard*, or based on similar interpretations of their own state constitutions. These states also appear to grant jury trial rights in class actions, although sometimes without explanation. While these states may recognize a right to jury trial in both class and derivative actions for a legal claim, they may differ in their interpretations of what constitutes a “legal” claim. For instance, some states look at the nature of the claim or the relief sought to decide if each claim is legal or equitable, while other states look at the overall action.

The Alabama Supreme Court has interpreted the Alabama Constitution as preserving the right to a jury trial for claims that existed at the time the constitution was adopted.<sup>122</sup> In *Finance, Investment & Rediscount Co. v. Wells*, the Alabama Supreme Court reversed and remanded the shareholder derivative claims because a “shareholder derivative action is an equitable cause of action” that “would not have been tried before a jury at common

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119. *Simmons v. Miller*, 544 S.E.2d 666, 672 n.1 (Va. 2001). Ultimately, the court upheld part of the jury verdict in the shareholder derivative action tried before a jury at law, because any objection was waived when neither the parties nor the trial court recognized the action was not one at law and because a state statute prevented dismissal upon appeal “simply because it was brought on the wrong side of the court.” *See id.* at 672 n.1, 679 (citing VA. CODE ANN. § 8.01-270 (repealed 2005)).

120. *See Jackson v. Va. Dep’t of Soc. Servs.*, Nos. G-9512-1, N-2608-3, N-2459-1, 1987 WL 488788, at \*5 (Va. Cir. Ct. Dec. 7, 1987) (“Although the court recognizes that there is precedent for entertaining a class action in equity in Virginia, including suits involving monetary relief, the individual factual questions concerning the benefits due each plaintiff are too numerous to handle efficiently in a single collective suit.”); *Moore v. Nat’l Wildlife Fed’n*, No. 10884, 1987 WL 488717, at \*1 (Va. Cir. Ct. Sept. 11, 1987) (“Class actions were not generally recognized at common law, but Courts of Equity have long recognized the right of one or a few to sue for themselves and all others similarly situated.”).

121. *Moore*, 1987 WL 488717, at \*1 (“Virginia has no class action statute or rule similar to Rule 23 of the Federal Rules of Civil Procedure.”).

122. *Ex parte Moore*, 880 So. 2d 1131, 1134 (Ala. 2003) (quoting *Gilbreath v. Wallace*, 292 So. 2d 651, 653 (Ala. 1974)); *see also* ALA. CONST. art. I, § 11 (“That the right of trial by jury shall remain inviolate.”).

law.”<sup>123</sup> On application for rehearing, however, the court adopted the *Ross v. Bernhard* approach in interpreting its state constitution to grant a right to jury trial for legal claims in shareholder derivative actions,<sup>124</sup> and that holding is recognized in Alabama’s corporate law.<sup>125</sup> The Alabama Supreme Court’s adoption of the *Ross* approach strongly suggests that a right to jury trial would also exist for legal claims in a class action, but the survey did not find any class action decided by a jury. However, in a putative class action case in which defendants sought to disqualify proposed class counsel, the Alabama Supreme Court stated that if class counsel is disqualified, “Defendants will have gained a victory without having to adjudicate this case before an Alabama jury.”<sup>126</sup>

In Arizona, the right to jury trial is preserved by the state constitution, and actions recognized at common law in 1910 possess a right to jury trial.<sup>127</sup> Citing *Ross*, the Arizona Court of Appeals has stated, “The nature of the issue to be tried rather than the character of the overall action determines the right to a jury trial.”<sup>128</sup> Thus, Arizona may recognize a right to jury trial for legal issues in derivative and class actions.<sup>129</sup> While no case allowing a jury trial in a shareholder derivative action was found, the survey identified case law supporting a jury trial right for class actions. In *Chartone, Inc. v. Bernini*, a class action alleging a medical records company charged unreasonable fees received a bifurcated jury trial on liability and damages.<sup>130</sup> The appellate court held that the district court’s use of a special master instead of a jury for the first part of the bifurcated trial violated the right to a jury trial.<sup>131</sup> At least one other class action has also been tried to a jury, although it was settled before the jury returned a verdict.<sup>132</sup>

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123. 409 So. 2d 1341, 1343 (Ala. 1982) (per curiam).

124. *Id.* at 1344 (Torbert, C.J., concurring).

125. RICHARD THIGPEN, ALABAMA CORPORATION LAW § 11:7 (4th ed. 2018) (noting that the Alabama Supreme Court in *Finance, Investment & Rediscount Co. v. Wells* recognized a jury trial right for legal claims in shareholder derivative actions).

126. *CVS Caremark Corp. v. Lauriello*, 175 So. 3d 596, 602 (Ala. 2014).

127. *Hoyle v. Super. Ct.*, 778 P.2d 259, 262 (Ariz. Ct. App. 1989); *see also* ARIZ. CONST. art. II, § 23 (“The right of trial by jury shall remain inviolate.”).

128. *Flieger v. Ash*, 624 P.2d 1295, 1299 (Ariz. Ct. App. 1980) (citing *Ross v. Bernhard*, 396 U.S. 531, 541 (1970)).

129. *See id.*

130. 83 P.3d 1103, 1105 (Ariz. Ct. App. 2004).

131. *Id.* at 1113–14.

132. *Sabet v. Olde Disc. Corp.*, No. CV 96-17622, 2001 WL 1246860, at \*3 (Ariz. Super. Ct. Oct. 10, 2001).



The Georgia Supreme Court has held the state constitution guarantees a jury trial right only for cases with such right “at common law or by statute at the time of the adoption of the Georgia Constitution in 1798.”<sup>133</sup> Georgia appears to recognize the right to jury trial for legal issues in shareholder derivative actions. In *Horne v. Drachman*, the Georgia Supreme Court reviewed a jury verdict rendered in a case where the stockholder brought both direct and derivative claims, but did not question whether a jury trial was proper.<sup>134</sup> Similarly, in several more recent cases where shareholder derivative actions were decided by jury trial, the Georgia Court of Appeals affirmed the verdicts without questioning the use of a jury.<sup>135</sup> Under Georgia’s Civil Practice Act, a class action may be brought at law or in equity depending on the relief sought in the action.<sup>136</sup> Georgia trial courts have allowed jury trials in class actions, and the appellate courts have not questioned the use of juries in these cases.<sup>137</sup>

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133. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 221 (Ga. 2010) (quoting *Benton v. Ga. Marble Co.*, 365 S.E.2d 413, 420 (Ga. 1988)); *see also* GA. CONST. art. I, § 1, ¶ XI(a) (“The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party.”).

134. 280 S.E.2d 338, 343–44 & n.4 (Ga. 1981) (noting that any recovery for increased rent would belong to the corporation, while finding the increased rent was fair to the corporation and properly ratified).

135. *See T.C. Prop. Mgmt., Inc. v. Tsai*, 600 S.E.2d 770, 771–73 (Ga. Ct. App. 2004) (affirming jury verdict in favor of shareholder who filed derivative action against corporation alleging breach of fiduciary duty, fraud, and breach of contract for corporation’s actions as general partner of a shopping center); *Dunaway v. Parker*, 453 S.E.2d 43, 45, 49 (Ga. Ct. App. 1994) (affirming jury verdict in action asserting alternative direct and derivative shareholder claims against CEO for self-dealing and upholding jury verdict on the direct claim that awarded damages based on shareholders’ percentage of ownership because the only other shareholders were related to the defendant CEO).

136. *Ford Motor Credit Co. v. London*, 332 S.E.2d 345, 347 (Ga. Ct. App. 1985); *cf.* *Herring v. Ferrell*, 216 S.E.2d 862, 863 (Ga. 1975) (*per curiam*) (noting that class actions are not automatically treated as equitable cases).

137. *See City of Atlanta v. Bennett*, 746 S.E.2d 198, 199, 202 (Ga. Ct. App. 2013) (reversing judgment entered on jury verdict in class action by firefighters because trial court abused its discretion in excluding testimony); *Jones v. Forest Lake Vill. Homeowners Ass’n*, 696 S.E.2d 453, 455–56, 459 (Ga. Ct. App. 2010) (finding evidence supported the jury’s verdict in a class action by homeowners but vacating judgment and remanding for entry of order describing the class members); *cf.* *State Farm Mut. Auto. Ins. v. Mabry*, 556 S.E.2d 114, 118 (Ga. 2001) (noting a jury trial can be proper in a declaratory judgment action but not error to proceed without a jury when no disputed facts requiring submission to a jury); *Med. Ctr., Inc. v. Bowden*, 820 S.E.2d 289, 304 (Ga. Ct. App. 2018) (finding that “a jury can make a decision on reasonableness of the chargemaster rates that will apply commonly across the entire class”); *Perez v. Atlanta Check Cashers, Inc.*, 692 S.E.2d 670, 676–77 (Ga.

The Hawaii Constitution preserves the right to jury trial in suits at common law that exceed \$5000,<sup>138</sup> and the Hawaii Supreme Court has held the constitutional right is the same as it existed under common law in 1959.<sup>139</sup> In *Lussier v. Mau-Van Development, Inc.*, a jury heard a shareholder derivative action, but the court entered a directed verdict at the close of plaintiff's evidence.<sup>140</sup> The Hawaii Court of Appeals held that some of the issues in the derivative action should have gone to the jury,<sup>141</sup> which supports a right to a jury trial for shareholder derivative actions. As to class actions, Hawaii Rule of Civil Procedure 23 extends the use of class actions to all civil suits, including legal and equitable claims.<sup>142</sup> And a recent case confirms that class actions possess a right to jury trial. In *Kawakami v. Kahala Hotel Investors, LLC*, the Hawaii Supreme Court reinstated a jury's verdict on causation and damages in a class action alleging that a hotel violated a state statute governing hotel and restaurant service charges.<sup>143</sup>

The Illinois Constitution states, "The right of trial by jury as heretofore enjoyed shall remain inviolate."<sup>144</sup> The Illinois Supreme Court has held that the right to jury trial exists only for actions possessing that right under English common law at the time the state constitution was adopted,<sup>145</sup> or for

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Ct. App. 2010) (upholding denial of class certification for employees against an employer and explaining "[t]he predominance inquiry requires a court to consider 'how a trial on the merits would be conducted if a class were certified'" (quoting *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008)).

138. HAW. CONST. art. 1, § 13 ("In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved.").

139. *SCI Mgmt. Corp. v. Sims*, 71 P.3d 389, 397 (Haw. 2003) (quoting *Housing Fin. & Dev. Corp. v. Ferguson*, 979 P.2d 1107, 1113 (Haw. 1999)).

140. 667 P.2d 804, 810, 830 (Haw. Ct. App. 1983).

141. *Id.* at 818, 820, 823–25.

142. *Montalvo v. Cheng*, 641 P.2d 1321, 1329 (Haw. 1982) (noting class actions were "formerly limited to suits in equity" but have now "been extended to all civil litigation in the circuit courts by Rule 23 of the Hawaii Rules of Civil Procedure"), *overruled on other grounds by* *Chun v. Bd. of Trs. of Emps.*, 992 P.2d 127 (Haw. 2000); HAW. R. CIV. P. 23.

143. 421 P.3d 1277, 1281–82, 1292 (Haw. 2018).

144. ILL. CONST. art. 1, § 13.

145. *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 753 (Ill. 1994) (noting Illinois' "constitution does not guarantee the right to a jury trial in any action nonexistent at common law, even if such action is legal in nature") (citing *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972)); *Seaman v. Thompson Elecs. Co.*, 758 N.E.2d 454, 456–57 (Ill. App. Ct. 2001) (finding no right to a jury trial for public utility employees suing as class to recover prevailing wages from their employer because no such right existed at common law).

actions in which the legislature has statutorily provided such a right.<sup>146</sup> As for shareholder derivative actions, Illinois lacks clear precedent. In *Ferris Elevator Co., Inc. v. Neffco, Inc.*, a jury decided a shareholder action containing both derivative and direct claims.<sup>147</sup> In reviewing the derivative claim, the appellate court considered whether the trial court had properly instructed the jury on the business judgment rule presumption and whether the jury had improperly granted a set-off to the corporation when it calculated damages.<sup>148</sup> Because the appellate court did not question whether a jury trial was proper, *Ferris Elevator* appears to support a right to a jury trial for derivative actions, but the survey found no other precedent. According to the Illinois Supreme Court, the class action device advances judicial economy by trying claims together, but “is not meant to alter the parties’ burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort.”<sup>149</sup> In *Rosolowski v. Clark Refining & Marketing*, after a jury entered a verdict for damages in a class action, the trial judge decertified the class, vacated the judgment on the jury verdict, and ordered separate trials on damages.<sup>150</sup> Subsequently, the Illinois Court of Appeals vacated the trial judge’s decertification and new trial orders and reinstated the jury’s verdict.<sup>151</sup> Similarly, the Illinois Supreme Court and the Illinois Court of Appeals have reviewed jury verdicts in other class actions without questioning the use of a jury.<sup>152</sup>

The Kansas Supreme Court has held that the constitutional guarantee of a civil jury trial extends to actions at common law that existed when the state

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146. *In re Estate of Mulvaney*, 470 N.E.2d 11, 12–13 (Ill. App. Ct. 1984) (“The flaw in the petitioners’ argument is that they fail to demonstrate any common law or statutory right to a trial by jury in the type of action they have pursued in the instant case.”); *see also Martin*, 643 N.E.2d at 753 (noting the state Consumer Fraud Act does not grant a jury trial right and holding no jury trial right otherwise exists for such statutory claim because it did not exist in common law); *Seaman*, 758 N.E.2d at 456 (“In other actions, no right to a jury trial exists unless the legislature specifically provides for one by statute.”).

147. 674 N.E.2d 449, 451 (Ill. App. Ct. 1996).

148. *Id.* at 453–54.

149. *Mashal v. City of Chi.*, 2012 IL 112341, ¶ 41, 981 N.E.2d 951, 965 (2012) (quoting *Smith v. Ill. Central R.R. Co.*, 860 N.E.2d 332, 338 (Ill. 2006)).

150. 890 N.E.2d 1011, 1013–14 (Ill. App. Ct. 2008).

151. *Id.* at 1019.

152. *Sims v. Allstate Ins. Co.*, 851 N.E.2d 701, 702–03 (Ill. App. Ct. 2006) (upholding a jury’s award for insurer in class action by car owners against the insurance company); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 810, 863–64 (Ill. 2005) (upholding a jury verdict in favor of plaintiffs on a breach of contract claim in a class action by policyholders); *Peoria Mun. Emps. Ass’n v. City of Peoria*, 537 N.E.2d 1115, 1116–18 (Ill. App. Ct. 1989) (not addressing fact that a jury decided the class action at the trial court level).

constitution was adopted.<sup>153</sup> “It is the nature of the action that determines whether the issue is one justiciable at common law with a right to a jury trial or an action in equity where a party is not entitled to a jury trial.”<sup>154</sup> In 1943, the Kansas Supreme Court held no right to jury trial exists in a shareholder derivative action because it is always one in equity, notwithstanding the shareholder may seek a legal remedy or the corporation could recover in an action at law.<sup>155</sup> However, in 1996, the Kansas Court of Appeals reinstated a jury verdict after finding a breach of fiduciary duty claim was asserted derivatively on behalf of the corporation, without questioning the use of a jury.<sup>156</sup> Thus, *Boyle* may provide a basis for arguing that a right to a jury trial exists in shareholder derivative actions. The right to jury trial is slightly clearer for class actions. In *Waggener v. Seever Systems, Inc.*, the Kansas Supreme Court considered the nature of the action as well as “whether the issue presented and the relief claimed entitled the plaintiff to a jury trial.”<sup>157</sup> The court noted the plaintiff would have been entitled to a jury trial if he had requested damages, since that remedy existed at common law, but no jury trial right existed for the equitable remedy of contract rescission that he sought.<sup>158</sup> Such statements suggest that Kansas courts would make the jury trial determination based on the character of the action as well as the relief sought, which supports a class action having a right to a jury trial for legal claims or remedies. Indeed, the Kansas Supreme Court has reviewed jury verdicts in class actions without questioning the use of a jury.<sup>159</sup>

The Kentucky Constitution guarantees the right to jury trial as it existed at common law in 1791.<sup>160</sup> Although scant precedent exists, Kentucky

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153. *Waggener v. Seever Sys., Inc.*, 664 P.2d 813, 817 (Kan. 1983); see also KAN. CONST. BILL OF RIGHTS § 5 (“The right of trial by jury shall be inviolate.”).

154. *Waggener*, 664 P.2d at 818.

155. *Snyder v. Lassen*, 132 P.2d 624, 629 (Kan. 1943) (holding no jury trial right in replevin case) (quoting 13 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5944).

156. *Boyle v. Harries*, 923 P.2d 504, 513 (Kan. Ct. App. 1996).

157. *Waggener*, 664 P.2d at 818–19.

158. *Id.* at 819.

159. See *Gilley v. Kan. Gas Serv. Co.*, 169 P.3d 1064, 1065–67, 1069 (Kan. 2007) (affirming jury verdict that found two defendants at fault but determined plaintiff class of business owners suffered no lost profits); *Smith v. Kan. Gas Serv. Co.*, 169 P.3d 1052, 1054–55, 1063 (Kan. 2007) (reversing jury verdict in class action by real property owners against gas storage facility operator for escape of natural gas because “the district court should have granted the defendants’ motion for judgment as a matter of law”).

160. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 908 S.W.2d 104, 106–08 (Ky. 1995) (stating “causes of action historically legal are triable by jury and causes of action historically equitable are triable by the court” and “if both legal and equitable issues are

appears to recognize a right to jury trial for legal claims in derivative and class actions. In *Graves v. Southeastern Fly Control Co.*, the Kentucky Supreme Court stated that a plaintiff may bring an action on behalf of the corporation to recover damages for mismanagement or misconduct by its director and that the action may be maintained at law or equity.<sup>161</sup> In *Sahni v. Hock*, the Kentucky Court of Appeals affirmed a jury verdict on a shareholder derivative claim that awarded \$58,300 in compensatory damages to the corporation.<sup>162</sup> Similarly, Kentucky has recognized a jury trial right in class actions. In *Wiley v. Adkins*, the Kentucky Supreme Court upheld a jury verdict for punitive and compensatory damages in a class action where business students alleged fraud by their college.<sup>163</sup>

The Maryland Constitution states, “The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of \$15,000, shall be inviolably preserved.”<sup>164</sup> In *Hashem v. Taheri*, the plaintiff pleaded a stockholder’s derivative claim as well as direct claims seeking damages.<sup>165</sup> The Maryland Court of Appeals noted that a derivative action is “traditionally an equitable remedy” in contrast with the legal claims in the direct action.<sup>166</sup> The court reversed because the trial court denied the right to jury trial on the common question of the stockholder’s status by deciding the derivative claim before the jury trial on the direct claims.<sup>167</sup> In *Mona v. Mona Electric Group, Inc.*,

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joined in a single cause of action, the appropriate mode of trial must be followed as to each”); see also KY. CONST. § 7 (“The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.”).

161. *Graves v. Se. Fly Control Co.*, 255 S.W.2d 635, 636 (Ky. 1953) (“The action may be maintained either at law or in equity, the only practical distinction being that at law the director or officer charged is regarded as an agent, while in equity he is regarded as a trustee of the corporation.”).

162. 369 S.W.3d 39, 44, 47 (Ky. Ct. App. 2010), *abrogated on other grounds by* Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C., 436 S.W.3d 189 (Ky. 2013).

163. 48 S.W.3d 20, 21, 23 (Ky. 2001); see also *Codell Const. Co. v. Miller*, 202 S.W.2d 394, 396, 399 (Ky. 1947) (reversing jury’s verdict in class action of all heirs of the deceased).

164. MD. CONST. DECLARATION OF RIGHTS art. 23.

165. 571 A.2d 837, 838–39 (Md. Ct. Spec. App. 1990).

166. *Id.* at 840.

167. *Id.*; see also *Martin v. Howard Cty.*, 667 A.2d 992, 996 (Md. Ct. Spec. App. 1995), *rev’d*, 709 A.2d 125 (Md. 1998) (describing the plaintiff in *Hashem v. Taheri* as asserting “both derivative actions, as a stockholder on behalf of a corporation (equitable claims), and direct claims for damages (legal claims), all of which were dependent on whether he was, in fact, a stockholder. The question was whether that issue, which was in dispute, was to be

the plaintiff argued that the trial court erred in taking the shareholder derivative claim alleging breach of fiduciary duty away from the jury.<sup>168</sup> Without questioning the propriety of a jury trial, the Maryland Court of Special Appeals affirmed holding that the shareholder's evidence was "legally insufficient to rebut the presumption created by the business judgment rule" and also that the plaintiff had not properly made the demand required to file a derivative claim.<sup>169</sup> While the court's opinion in *Hashem* suggests that the derivative claim was an equitable one to be decided by the court after trial on the direct claims, the court's opinion in *Mona* did not question the use of a jury trial for a derivative claim. Likewise, no clear precedent was found on the right to jury trial in class actions. In *Phillip Morris Inc. v. Angeletti*, the trial court had approved a three-phase jury trial for a class action, but the Court of Appeals of Maryland decertified the class without questioning the propriety of a jury trial for a class action.<sup>170</sup> In *LVNV Funding, LLC v. Finch*, the Maryland Court of Special Appeals affirmed the jury verdict in favor of a plaintiff class of consumers alleging consumer protection statute and unjust enrichment claims, but remanded for a new jury trial on damages.<sup>171</sup>

Michigan interprets its constitution as preserving the right to jury trial for claims that existed when the constitution was adopted, which means that trial by jury is preserved in legal matters but not equity matters.<sup>172</sup> In *Madugula v. Taub*, the Michigan Supreme Court noted that "courts of equity have long heard shareholders' . . . derivative claims," which were considered equitable claims when the state constitution was adopted in 1963.<sup>173</sup> However, in *Miller v. Village Hill Development Corp.*, a jury decided a shareholder derivative action alleging waste and conversion, and the appellate court affirmed the jury verdict without questioning whether a jury trial was proper in a derivative action.<sup>174</sup> Although no precedent

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tried by a jury as a law case or a judge as an equitable case. We concluded that the common issue was triable by a jury . . .").

168. *Mona v. Mona Elec. Grp.*, 934 A.2d 450, 461–63 (Md. Ct. Spec. App. 2007).

169. *Id.* at 461–63, 469–70.

170. 752 A.2d 200, 207, 254 (Md. 2000).

171. No. 24–C–11–007101, 2017 WL 6388959, at \*2, \*32 (Md. Ct. Spec. App. Dec. 14, 2017).

172. *Madugula v. Taub*, 853 N.W.2d 75, 85–86 (Mich. 2014); *see also* MICH. CONST. art. I, § 14 ("The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law.").

173. *Madugula*, 853 N.W.2d at 87–88.

174. No. 220297, 2001 WL 754050, at \*1, \*5 (Mich. Ct. App. July 3, 2001); *cf.* *Hosner v. Brown*, 199 N.W.2d 295, 308 (Mich. Ct. App. 1972) (finding no error in denial of jury

expressly holds class actions have a right to jury trial for legal claims, the Michigan Court of Appeals has reviewed numerous jury verdicts in class actions without ever questioning the use of a jury.<sup>175</sup>

The New Jersey Constitution preserves the right to a jury trial that existed when the state constitution was adopted,<sup>176</sup> which state courts interpret as guaranteeing a jury trial right “only for causes of action at law, not at equity.”<sup>177</sup> However, New Jersey courts also “look to the nature of the most appropriate remedy, not the nature of the cause of action” in determining the right to jury trial.<sup>178</sup> Case law suggests New Jersey may recognize a right to jury trial in both derivative and class actions. In *Cripps v. DiGregorio*, the appellate court affirmed a jury verdict in a shareholder derivative action without questioning whether a jury trial was proper.<sup>179</sup> In *Muise v. GPU, Inc.*, the New Jersey Superior Court specifically held that a class action seeking money damages against a utility for negligent failure to provide service during a heat wave was entitled to a jury trial.<sup>180</sup>

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trial in shareholder derivative action because jury trial was not demanded until trial and claims were all equitable in nature).

175. *Neal v. Dep’t of Corr.*, No. 285232, 2009 WL 187813, at \*1, \*8 (Mich. Ct. App. Jan. 27, 2009) (unpublished table decision) (affirming a jury verdict in favor of a class of female prisoners); *Briney v. Kelsey-Hayes*, No. 218621, 2001 WL 951624, at \*1 (Mich. Ct. App. Aug. 21, 2001) (unpublished table decision) (affirming the jury verdict in an employment class action); *Brenner v. Marathon Oil Co.*, 565 N.W.2d 1, 4–5 (Mich. Ct. App. 1997) (finding a settlement entered over objection of majority class members was improper and plaintiffs were entitled “to their day in court before a jury”); *Miller v. City of Detroit*, 462 N.W.2d 856, 856–57 (Mich. Ct. App. 1990) (per curiam) (reversing jury verdict in favor of class but not questioning whether jury trial was proper); *Oakwood Homeowner’s Ass’n, Inc. v. Ford Motor Co.*, 258 N.W.2d 475, 484 (Mich. Ct. App. 1977) (affirming certification of a class of homeowners and, in discussing the complexity of the issues, stating the case could be tried to a jury with proper jury instructions).

176. *See* N.J. Sports & Exposition Auth. v. Del Tufo, 510 A.2d 329, 330 (N.J. Super. Ct. App. Div. 1986); *see also* N.J. CONST. art. I, ¶ 9 (“The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons.”).

177. *Muise v. GPU, Inc.*, 753 A.2d 116, 131 (N.J. Super. Ct. App. Div. 2000).

178. *Id.* at 132.

179. 824 A.2d 1104, 1104–06 (N.J. Super. Ct. App. Div. 2003); *cf. In re PSE&G S’holder Litig.*, 801 A.2d 295, 320 (N.J. 2002) (upholding summary judgment because no issues for jury to resolve in shareholder derivative suit).

180. *Muise*, 753 A.2d at 119, 132; *cf. Folbaum v. Rexall Sundown, Inc.*, No. A-244-02T1, 2004 WL 3574116, at \*1 (N.J. Super. Ct. App. Div. May 4, 2004) (holding the class was improperly certified but allowing the jury’s finding on damages in drug labeling to stand without questioning whether a jury trial was proper).

The New Mexico Constitution states, “The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.”<sup>181</sup> In *Scott v. Woods*, the New Mexico Court of Appeals adopted *Ross v. Bernhard* and expressly recognized a right to jury trial in derivative actions.<sup>182</sup> The court stated that if a shareholder derivative action raises legal claims or issues as to which the corporation is entitled to a jury trial, those claims or issues should be tried to a jury upon demand.<sup>183</sup> On appeal, the New Mexico Supreme Court affirmed the adoption of *Ross*.<sup>184</sup> Having adopted *Ross*, New Mexico likely recognizes a right to jury trial in class actions. In a case predating *Scott v. Woods*, the state supreme court affirmed a jury verdict in a class action by water users against a utility on quality issues.<sup>185</sup> More recently, upholding class certification for cigarette wholesalers alleging antitrust violations by manufacturers, the New Mexico Court of Appeals stated that “it is for the jury to determine whether Plaintiffs’ expert is correct in his assessment of injury.”<sup>186</sup> While not expressly holding class actions possess a right to a jury trial for legal claims, the identified cases support that conclusion.

The New York Constitution provides, “Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever.”<sup>187</sup> For derivative actions, the New York Superior Court has adopted the *Ross* approach and held that the right to a jury trial in a shareholder derivative action is judged as if the corporation itself had brought the action.<sup>188</sup> In *Rocha Toussier y Asociados, S.C. v. Rivero*, the court upheld a demand for jury trial on the legal claims of conspiracy in a shareholder derivative lawsuit despite the complaint also asserting equitable claims.<sup>189</sup> Weak precedential support exists for a jury trial right in class actions within New York. In *Schneider v. Lazard Freres & Co.*, a class of shareholders sought class certification in New York instead of Delaware because New York allowed class certification for their claims and a right to

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181. N.M. CONST. art. II, § 12.

182. *Scott v. Woods*, 730 P.2d 480, 486 (N.M. Ct. App. 1986).

183. *Id.* at 484–85 (citing N.M. CONST. art. 2, § 12).

184. *Blea v. Fields*, 120 P.3d 430, 434–35 (N.M. 2005) (overruling *State ex rel. McAdams v. Dist. Ct. of Eighth Judicial Dist.*, 728 P.2d 1364 (N.M. 1986)).

185. *Valley Utils., Inc. v. O’Hare*, 550 P.2d 274, 276–77 (N.M. 1976) (affirming jury verdict but finding that only those class members joining the suit prior to the jury verdict can benefit from it).

186. *Romero v. Philip Morris, Inc.*, 109 P.3d 768, 780 (N.M. Ct. App. 2005).

187. N.Y. CONST. art. I, § 2.

188. *Fedoryszyn v. Weiss*, 310 N.Y.S.2d 55, 58–60 (N.Y. Sup. Ct. 1970).

189. 607 N.Y.S.2d 282, 282 (N.Y. App. Div. 1994) (memorandum decision).



a jury trial, but the court ultimately stayed the action.<sup>190</sup> In *Goshen v. Mutual Life Insurance Co. of New York*, a class of insureds sued an insurance company for rescission, restitution, and reformation of insurance policies, and also sought an injunction.<sup>191</sup> The court found that the class was not entitled to a jury “[b]ecause the relief sought [was] primarily equitable.”<sup>192</sup> Even after the equitable claims were dropped, the court held there was no right to a jury trial: “Once the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement, or withdrawal of the equitable claim(s) will not revive the right to trial by jury.”<sup>193</sup> Nevertheless, *Goshen* suggests a right to jury trial may exist in a class action asserting only legal claims.

North Carolina’s Constitution provides, “In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.”<sup>194</sup> The North Carolina Supreme Court has stated that its state constitution “ensures that there is a right to trial by jury where the underlying cause of action existed at the time of adoption of the 1868 constitution, regardless of whether the action was formerly a proceeding in equity.”<sup>195</sup> North Carolina clearly recognizes a right to jury trial in shareholder derivative actions. In *Faircloth v. Beard*, the North Carolina Supreme Court stated that, under the state constitution, plaintiffs were entitled to a jury trial on questions of fact even though the action was equitable in nature, and recognized that a shareholder derivative action is an action “to protect private rights and to redress private wrongs.”<sup>196</sup> Subsequently, in *Kiser v. Kiser*, the North Carolina Supreme Court partially overruled *Faircloth* and held that the right to jury trial is determined by whether the claim was equitable or legal at the time the constitution was adopted in 1868.<sup>197</sup> However, the court stated that its decision “does not disturb the result in *Faircloth*” because “there was a common law right to bring a shareholders’ derivative suit in courts of equity long before” the

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190. 552 N.Y.S.2d 571, 572–73 (N.Y. App. Div. 1990) (memorandum decision).

191. 730 N.Y.S.2d 46, 48 (N.Y. App. Div. 2001).

192. *Id.*

193. *Id.* (quoting *Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 559 N.Y.S.2d 888, 889–90 (N.Y. App. Div. 1990)).

194. N.C. CONST. art. I, § 25.

195. *Kiser v. Kiser*, 385 S.E.2d 487, 491 (N.C. 1989).

196. 358 S.E.2d 512, 514 (N.C. 1987) (“They are civil actions under Article IV, Sec. 13 and this section of the Constitution guarantees that parties to such actions may have questions of fact tried by juries.”).

197. *Kiser*, 385 S.E.2d at 491–92.

state statutorily recognized such right.<sup>198</sup> The survey found one case in North Carolina supporting a right to jury trial in class actions. In *Cotton v. Stanley*, the North Carolina Court of Appeals affirmed a jury verdict for a class of tenants that found defendants engaged in unfair business practices without questioning the use of a jury in a class action.<sup>199</sup>

The Ohio Constitution states, “The right of trial by jury shall be inviolate.”<sup>200</sup> Two cases may provide a basis for inferring that a right to jury trial exists in shareholder derivative actions. In *Hoepfner v. Jess Howard Electric Co.*, the appellate court affirmed the jury’s verdict in favor of the plaintiffs on a shareholder derivative claim alleging breach of fiduciary duty without questioning the use of a jury.<sup>201</sup> Similarly, in *Peterson v. Camelot Court Development, Inc.*, a shareholder derivative action was tried to the jury, and the jury verdict was upheld on appeal.<sup>202</sup> Ohio may recognize a right to jury trial in class actions seeking primarily legal relief, but the precedential support is weak. In *Reynolds v. CSX Transportation, Inc.*, the Ohio Court of Appeals held that certification of a class on issues of negligence and malice would not deny defendant the right to jury trial on punitive damages.<sup>203</sup> In *Miles v. N. J. Motors, Inc.*, the trial court denied a jury trial when a class of debtors sued a secured creditor regarding disposition of repossessed cars.<sup>204</sup> The appellate court found that the “trial court did not abuse its discretion . . . in refusing to impanel a jury, even though there were collateral and subordinate issues of law” because the class primarily sought equitable relief.<sup>205</sup>

The South Dakota Supreme Court has held that an action at law has a jury trial right under the state constitution, but “a jury trial is a matter for the trial court’s discretion” for equitable actions.<sup>206</sup> It has instructed courts to determine whether an action is legal or equitable by looking at the

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198. *Id.* (citing *Hawes v. Oakland*, 104 U.S. 450 (1881); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1856); *Coble v. Beall*, 41 S.E. 793 (N.C. 1902); *Moore v. Silver Valley Mining Co.*, 10 S.E. 679 (N.C. 1889)).

199. 380 S.E.2d 419, 421–22 (N.C. Ct. App. 1989).

200. OHIO CONST. art. I, § 5.

201. 150 Ohio App. 3d 216, 2002-Ohio-6167, 780 N.E.2d 290, at ¶¶ 41–46.

202. No. 93-L-155, 1994 WL 757936, at \*1 (Ohio Ct. App. Nov. 10, 1994).

203. 561 N.E.2d 1047, 1049 (Ohio Ct. App. 1989).

204. 338 N.E.2d 784, 785, 788 (Ohio Ct. App. 1975).

205. *Id.* at 788.

206. *Mundhenke v. Holm*, 2010 SD 67, ¶¶ 13–15, 787 N.W.2d 302, 305–06 (quoting *First W. Bank v. Livestock Yards Co.*, 466 N.W.2d 853, 856 (S.D. 1991)); *see also* S.D. CONST. art. VI, § 6 (“The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy . . .”).

pleadings and the prayer for relief,<sup>207</sup> and stated that “[a] circuit court has broad discretion in an equitable action to determine whether to grant or deny a jury trial.”<sup>208</sup> South Dakota appears to recognize a jury trial right in derivative actions. In *Noble ex rel. Drenker v. Shaver*, the South Dakota Supreme Court held that “[t]he only way to determine the appropriate damages” on shareholder derivative claims was “to present the case to a jury for its determination.”<sup>209</sup> South Dakota also appears to recognize a right to jury trial for class actions, although no case was found in which a class action was decided by a jury. In *In re South Dakota Microsoft Antitrust Litigation*, the South Dakota Supreme Court affirmed class certification in an antitrust action against Microsoft and held that the jury at trial should assess the expert testimony and scientific data.<sup>210</sup>

Texas preserves the right to jury trial for those actions, or analogous actions, tried to a jury when its constitution was adopted in 1876.<sup>211</sup> Two cases suggest a right to a jury trial may exist in shareholder derivative actions. In *Mills v. Withers*, a shareholder derivative action was tried to a jury, and the issue of whether a jury trial was proper was not considered on appeal.<sup>212</sup> Similarly, in *Lundy v. Masson*, a shareholder derivative action was tried to a jury, and the appellate court affirmed the jury’s verdict in favor of the plaintiff on the breach of fiduciary duty claim and did not question the use of a jury.<sup>213</sup> A right to jury trial may also exist for legal claims in class actions. While no direct precedent was found, the Texas Supreme Court has stated that the class action device is not intended to alter a party’s right to jury trial.<sup>214</sup> In *Wal-Mart Stores, Inc. v. Lopez*, the Texas Court of Appeals held that class certification was not allowed because

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207. *Mundhenke*, 2010 SD 67, ¶ 14, 787 N.W.2d at 306.

208. *Id.* ¶ 11, 787 N.W.2d at 305.

209. 1998 SD 102, ¶ 22, 583 N.W.2d 643, 648.

210. 2003 SD 19, ¶¶ 27–32, 657 N.W.2d 668, 678–79.

211. *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 526 (Tex. 1995); *see also* TEX. CONST. art. I, § 15 (“The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.”).

212. 483 S.W.2d 339, 340, 344 (Tex. Civ. App. 1972).

213. 260 S.W.3d 482, 488, 491, 510 (Tex. App. 2008); *see also* *Bass v. Walker*, 99 S.W.3d 877, 881–82 (Tex. App. 2003) (class action asserting breach of fiduciary duty and breach of contract claims was tried to a jury).

214. *Sw. Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (“The class action is a procedural device intended to advance judicial economy . . . . It is not meant to alter the parties’ burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort.”).

statistical analysis would prevent individual inquiry and cross-examination depriving the defendant of its right to jury trial.<sup>215</sup> However, the court did not suggest a class action could never be tried to a jury. Similarly, in *Hardy v. Wise*, the Texas Court of Appeals reversed a jury determination in a class action because the class failed to comply with class certification requirements, but the court did not question whether a jury trial was proper.<sup>216</sup>

In Wisconsin, “The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.”<sup>217</sup> Wisconsin historically treated shareholder derivative actions as equitable actions, which did not have a right to a jury trial.<sup>218</sup> However, jury trials have been held in more recent derivative cases. In *Estate of Emch v. Ernst*, a shareholder derivative action was tried before a jury and the issue of whether a jury trial was proper was not addressed on appeal.<sup>219</sup> Additionally, in *Strassman v. Gehling*, although the Wisconsin Court of Appeals stated that “[s]hareholders’ derivative actions, such as Strassman’s, are actions in equity,” the court affirmed the judgment which included the jury verdict.<sup>220</sup> Although not expressly deciding the issue, these cases provide a basis for arguing a right to a jury trial exists in derivative actions. The survey, however, found only one case supporting a right to jury trial in class actions. In *In re Wal Mart Employee Litigation*, the Wisconsin Court of Appeals stated that the class action process does *not* trump a defendant’s jury trial right under the state constitution, meaning that “the parties to a class-action lawsuit have the right to have all ‘jurable issues’ decided by the same jury.”<sup>221</sup> For example, the employer was entitled to jury examination of the employees’ statistical conclusions and underlying data.<sup>222</sup>

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215. 93 S.W.3d 548, 560–61 (Tex. App. 2002).

216. *Hardy v. Wise*, 92 S.W.3d 650, 652, 654 (Tex. App. 2002) (per curiam).

217. WIS. CONST. art. 1, § 5.

218. *See Neff v. Barber*, 162 N.W. 667, 668 (Wis. 1917).

219. No. 82-907, 1984 WL 180460, at \*1–2 (Wis. Ct. App. Mar. 27, 1984) (unpublished table decision).

220. No. 93-2010, 1995 WL 134495, at \*1–2 (Wis. Ct. App. Mar. 30, 1995) (unpublished table decision) (citing *Mulder v. Mittelstadt*, 352 N.W.2d 223, 228 (Wis. Ct. App. 1984)); *see also Jolin v. Oster*, 198 N.W.2d 639, 642 (Wis. 1972) (noting court in equity actions may “submit questions of fact to an advisory jury”).

221. 2006 WI App 36, ¶ 6, 290 Wis. 2d 225, 232, 711 N.W.2d 694, 697 (quoting *Markweise v. Peck Foods Corp.*, 556 N.W.2d 326, 333 (Wis. Ct. App. 1996)).

222. *Id.* ¶ 6, 290 Wis. 2d at 233, 711 N.W.2d at 696–98.

The Wyoming Constitution does not preserve a right to jury trial for civil cases in its constitution,<sup>223</sup> but its rules of procedure state that “issues of fact arising in actions for the recovery of money only, or specific real or personal property, must be tried by a jury unless a jury trial be waived, or a reference be ordered.”<sup>224</sup> When a case involves both issues of law and equity, the right to jury trial “does not turn on the presence of a single issue that can be styled as historically equitable,” but rather the pleadings and issues are examined to determine if the action is primarily legal or equitable in nature.<sup>225</sup> In *Hyatt Bros., Inc. ex rel. Hyatt v. Hyatt*, the Wyoming Supreme Court held that “stockholders’ derivative actions, even if they include a request for an accounting, are not automatically considered actions purely in equity.”<sup>226</sup> Although the plaintiffs in *Hyatt* requested certain types of equitable relief, the court found those requests “secondary to the primary claims seeking money damages under legal theories,” and held that the action was “primarily legal in nature” and remanded for a jury trial.<sup>227</sup> Although the survey revealed only one case in which the plaintiffs demanded a jury trial in a class action,<sup>228</sup> the Wyoming Supreme Court’s opinion in *Hyatt Bros.* suggests a right to jury trial also exists for class actions that are primarily legal in nature.

*3. States Appearing to Grant a Right to Jury Trial in Class Actions, but Not in Shareholder Derivative Actions*

The remaining twenty-two states have recognized a right to jury trial in class actions, but appear to continue to deny such a right in derivative actions. Some of these states deny a jury trial right in derivative actions based on the historically equitable nature of derivative actions, despite both class and derivative actions being historically equitable actions. Other states, while recognizing the jury trial right in class actions, have simply not addressed the issue in derivative actions.

The Alaska Constitution states, “In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of

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223. See WYO. CONST. art. I, § 9 (“The right of trial by jury shall remain inviolate in criminal cases. A jury in civil cases and in criminal cases where the charge is a misdemeanor may consist of less than twelve (12) persons but not less than six (6), as may be prescribed by law.”).

224. WYO. R. CIV. P. 38(a).

225. *Hyatt Bros., Inc. ex rel. Hyatt v. Hyatt*, 769 P.2d 329, 333 (Wyo. 1989); see also *Ferguson v. Ferguson*, 739 P.2d 754, 758 (Wyo. 1987).

226. *Hyatt Bros.*, 769 P.2d at 335.

227. *Id.* at 335–36.

228. *Gookin v. State Farm Fire & Cas. Ins. Co.*, 826 P.2d 229, 231 (Wyo. 1992).

twelve is preserved to the same extent as it existed at common law.”<sup>229</sup> Thus, no right to a jury trial exists if the claim “seeks only equitable relief.”<sup>230</sup> The survey did not find any precedent upholding a right to jury trial for a legal claim in a shareholder derivative action. One commentator has suggested that the Alaska Supreme Court’s opinion in *Alaska Plastics, Inc. v. Coppock*<sup>231</sup> supports a right to jury trial in a derivative action,<sup>232</sup> but the trial court utilized merely an “advisory jury” rather than recognizing a right to jury trial.<sup>233</sup> That advisory jury heard two of the plaintiff’s direct claims, but the judge dismissed the plaintiff’s derivative suit at the trial’s conclusion and the Alaska Supreme Court affirmed that dismissal for insufficient evidence “to establish a breach of duty towards the corporation.”<sup>234</sup> While no precedent directly has held that class actions possess a right to jury trial for legal claims, the Alaska Supreme Court affirmed a jury verdict in a class action in *International Seafoods of Alaska, Inc. v. Bissonette*.<sup>235</sup>

Arkansas’s Constitution provides, “The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy.”<sup>236</sup> In the shareholder derivative suit context, Arkansas traditionally treated the form of the action as dispositive, so the historically equitable nature of a derivative suit excluded any right to a jury trial, even when the substantive claim involved a legal issue.<sup>237</sup> In November 2000, Arkansas voters agreed to merge the courts of law and equity,<sup>238</sup> but the Arkansas Supreme Court has not expressly ruled on the right to a jury trial in derivative or class actions since then. Because Arkansas law prohibits procedural rules from being applied to diminish the right to a trial by

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229. ALASKA CONST. art. I, § 16.

230. *Vinson v. Hamilton*, 854 P.2d 733, 736 (Alaska 1993) (citing *State v. First Nat’l Bank of Anchorage*, 660 P.2d 406, 423–24 (Alaska 1982)); see also *Richardson v. Estate of Berthelot*, No. 5-13696, 2013 WL 203271, at \*10 (Alaska Jan. 16, 2013) (“The Alaska Constitution guarantees parties the right to a jury trial only to the extent that the right existed at common law. We have held that no constitutional right to a jury trial exists in matters of equity.”) (footnotes omitted).

231. 621 P.2d 270 (Alaska 1980).

232. DEMOTT, *supra* note 19, § 4:18 & n.11.

233. *Alaska Plastics*, 621 P.2d at 273.

234. *Id.* at 278.

235. 146 P.3d 561, 564–66, 573 (Alaska 2006).

236. ARK. CONST. art. II, § 7.

237. *Hames v. Cravens*, 966 S.W.2d 244, 246–48 (Ark. 1998).

238. See 2 DAVID NEWBERN ET AL., ARKANSAS CIVIL PRACTICE AND PROCEDURE § 29:3 (5th ed. 2019) (stating law and equity are now merged).

jury,<sup>239</sup> plaintiffs in a class or shareholder derivative action might be able to demand a jury trial. While the survey found no derivative case tried to a jury, Arkansas appears to allow jury trials in class actions. Arkansas's statutory provision for class actions applies to actions in law and equity,<sup>240</sup> and the Arkansas Supreme Court affirmed a jury verdict in a class action in *SEECO, Inc. v. Hales*.<sup>241</sup>

The California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all."<sup>242</sup> California courts interpret the state constitution as preserving the right to jury trial as it existed at common law in 1850.<sup>243</sup> The California Supreme Court looks at the "nature of the rights involved and . . . the Gist of the action" in determining if an action is legal or equitable, and the relief sought is an important factor but is not determinative.<sup>244</sup> For shareholder derivative actions, California has specifically rejected *Ross v. Bernhard*, declining to depart from the "historically based approach" of interpreting the state constitution and holding that no right to a jury trial exists in derivative actions.<sup>245</sup> In *Caira v. Offner*, the California Court of Appeals held that no constitutional right to jury trial exists in a shareholder derivative action even where punitive damages are sought.<sup>246</sup> However, California may recognize a right to jury trial in class actions. In *Washington Mutual Bank v. Superior Court*, the California Supreme Court held that a plaintiff seeking class certification may need to submit sample jury instructions and special verdict forms to show how class claims with bases in different states could be presented to a jury for resolution,<sup>247</sup> which suggests class actions may have a jury trial right. More specifically, in *Cristler v. Express Messenger Systems, Inc.*, the

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239. Walker v. First Commercial Bank, 880 S.W.2d 316, 319 (Ark. 1994); McDaniel, *supra* note 12, at 563–65 (discussing the Arkansas vote to amend the state constitution to merge "the then separate courts of law and equity").

240. Thomas v. Dean, 432 S.W.2d 771, 773 (Ark. 1968) ("We hold that the statutory provision for class action applies to both actions in equity and actions at law.").

241. 22 S.W.3d 157, 161, 182 (Ark. 2000) (affirming a jury verdict in a class action against a gas producer that awarded over \$62 million in compensatory damages and \$31 million in prejudgment interest).

242. CAL. CONST. art. I, § 16.

243. Beasley v. Wells Fargo Bank, 1 Cal. Rptr. 2d 446, 449–50 (Ct. App. 1991); *see also* Rankin v. Frebank Co., 121 Cal. Rptr. 348, 359 (Ct. App. 1975).

244. C & K Eng'g Contractors v. Amber Steel Co., 587 P.2d 1136, 1140–41 (Cal. 1978) (holding claim for breach of gratuitous promise was only recognized in equity and noting damages do not make an equitable action legal).

245. Rankin, 121 Cal. Rptr. at 358–59.

246. 24 Cal. Rptr. 3d 233, 253–54 (Ct. App. 2005).

247. 15 P.3d 1071, 1083–86 (Cal. 2001).

California Court of Appeals upheld a jury verdict that found a class of drivers for a package delivery service were independent contractors, not employees.<sup>248</sup> Finally, in *Beasley v. Wells Fargo Bank*, the California Court of Appeals held that no right to jury trial existed for credit card holders' class action claim for equitable relief, but a jury trial was proper on the bank's cross-complaint to recover fees because it was a legal remedy.<sup>249</sup> Recognizing a jury trial right for a defendant's legal claim in a class action suggests a legal claim by the class would also be entitled to a jury trial.

Colorado does not have a constitutional right to trial by jury in civil actions.<sup>250</sup> Instead, trial by jury is governed by Colorado Rule of Civil Procedure 38(a), which states that a right to jury trial exists where provided by statute, including actions to recover real or personal property, damages for breach of contract, and damages for injuries to person or property.<sup>251</sup> The Colorado Supreme Court has stated that the character of the action determines whether the issue will be tried to jury and that no right to jury trial exists for actions historically brought in equity.<sup>252</sup> This language suggests the historically equitable class and derivative actions possess no jury trial right. While the survey did not find any derivative action tried to a jury, the Colorado Court of Appeals has affirmed jury verdicts in two class actions without questioning the propriety of a jury trial.<sup>253</sup> These cases

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248. 89 Cal. Rptr. 3d 34, 38–39 (Ct. App. 2009).

249. *Beasley v. Wells Fargo Bank*, 1 Cal. Rptr. 2d 446, 449–50 (Ct. App. 1991); *see also* *Van de Kamp v. Bank of Am.*, 251 Cal. Rptr. 530, 553–54 (Ct. App. 1988) (concluding class action was one in equity and not entitled to jury trial because damages were available only by the application of equitable principles of an accounting); *Hodge v. Super. Ct.*, 51 Cal. Rptr. 3d 519, 526 (Ct. App. 2006) (affirming denial of jury trial in class action for bank overtime pay because the statutory claim was equitable in nature despite contract issues and factual determinations).

250. COLO. CONST. art. II, § 23 (“The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law.”); *Kaitz v. Dist. Ct.*, 650 P.2d 553, 554 (Colo. 1982) (en banc) (“In Colorado there is no constitutional right to a trial by jury in a civil action.”) (citing *Fed. Lumber Co. v. Wheeler*, 643 P.2d 31 (Colo. 1981); *Gleason v. Guzman*, 623 P.2d 378 (Colo. 1981); *Setchell v. Dellacroce*, 454 P.2d 804 (Colo. 1969)).

251. COLO. R. CIV. P. 38(a).

252. *Kaitz*, 650 P.2d at 555.

253. *Patterson v. BP Am. Prod. Co.*, 2015 COA 28, ¶ 1, 360 P.3d 211, 215 (affirming a jury verdict in class action brought by royalty owners alleging “underpayment of royalties on the sale of natural gas”); *Elk River Assocs. v. Huskin*, 691 P.2d 1148, 1150, 1155 (Colo. App. 1984) (affirming judgment on jury’s verdict in class action for deceit based on fraud claim, reversing judgment notwithstanding the verdict as to constructive fraud claim, and remanding for reinstatement of jury verdict); *cf. Jackson v. Unocal Corp.*, 262 P.3d 874, 887



provide some precedential support for a jury trial right in future class actions.

The Connecticut Constitution states that “[t]he right of trial by jury shall remain inviolate,”<sup>254</sup> which the Connecticut Supreme Court interprets as requiring a court to determine if the action is similar to an action tried to a jury when the state constitution was adopted in 1818.<sup>255</sup> This determination “requires an inquiry as to whether the [cause] of action has roots in the common law, and if so, whether the remedy involved was one in law or equity.”<sup>256</sup> While a class or shareholder derivative action was historically equitable, the asserted cause of action and remedy sought may be legal which may support a right to jury trial. However, the survey found no precedent in which a derivative action was tried to a jury. One precedent may support a right to jury trial for class actions seeking a legal remedy. In *Evans v. General Motors Corp.*, the Connecticut Supreme Court held that a class claim for misappropriation of trade secrets was an action for damages and thus was entitled to a jury trial.<sup>257</sup>

Delaware maintains the separation of law and equity with a Superior Court and a Court of Chancery.<sup>258</sup> Shareholder derivative actions must be filed in the Court of Chancery, which “applies its own standards in processing derivative actions” and the “absence of a right to jury trial” is an example.<sup>259</sup> The right to jury trial, to the extent it exists, belongs to the corporation.<sup>260</sup> While Delaware traditionally permitted class actions only in the Court of Chancery, today class actions are also permitted in the

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(Colo. 2011) (en banc) (noting trial court may hold hearing to determine if a “class-wide theory of proof [exists] that can be presented to a jury at trial”).

254. CONN. CONST. art. I, § 19.

255. *Skinner v. Angliker*, 559 A.2d 701, 704 (Conn. 1989).

256. *Id.* But see *Franchi v. Farmholme, Inc.*, 464 A.2d 35, 40 (Conn. 1983) (stating the relief makes little difference in determining jury trial right, as court must look at whether the cause of action is essentially legal or equitable).

257. 893 A.2d 371, 379–85 (Conn. 2006). The holding of *Evans* was codified in 2008. CONN. GEN. STAT. § 42-110g(b), (g) (2019) (providing right to a jury trial in class actions for unfair trade practices).

258. See DEL. CODE ANN. tit. 10, § 341 (West 2019); DEL. CODE ANN. tit. 10, § 541 (West 2019); see also *LG Elecs., Inc. v. InterDigital Commc’ns, Inc.*, 98 A.3d 135, 143 (Del. Ch. 2014) (“Today, only Delaware, Tennessee, and Mississippi retain separate courts of equity.”).

259. *Levien v. Sinclair Oil Corp.*, 314 A.2d 216, 221 (Del. Ch. 1973).

260. *Epps v. Park Centre Condo. Council*, No. 95C-05-033-WTQ, 2000 WL 1211163, at \*7 (Del. Super. Ct., Aug. 18, 2000); DEL. CONST. art. I, § 4 (“Trial by jury shall be as heretofore.”).

Superior Court pursuant to Superior Court Rule of Civil Procedure 23.<sup>261</sup> While a class action filed in the Court of Chancery would have no right to jury trial, a class action filed in Superior Court would possess a right to jury trial for legal issues.<sup>262</sup> However, research did not find any appellate case reviewing a class action in which a jury trial was held.

The Florida Constitution states, “The right of trial by jury shall be secure to all and remain inviolate.”<sup>263</sup> The Florida courts have interpreted this constitutional provision to mean that the right to jury trial applies to legal claims, not equitable claims.<sup>264</sup> As in many states, however, the lack of a right to jury trial “would not prevent the trial judge from granting a jury trial as a matter of discretion.”<sup>265</sup> In shareholder derivative actions, the Florida Court of Appeals has stated that the form of the action is dispositive; thus, the equitable nature of a derivative suit excludes any right to a jury trial, even when the substantive claim involves a legal rather than equitable claim.<sup>266</sup> Indeed, the court has explicitly rejected *Ross v. Bernhard* and held that the right to jury trial only extends to cases recognized at common law in 1845.<sup>267</sup> By contrast, Florida has implicitly recognized a right to jury trial for legal claims in class actions. In *Engle v. Liggett Group, Inc.*, a jury determined liability and damages in a nationwide class action against cigarette manufacturers.<sup>268</sup> The Florida Supreme Court upheld the compensatory damages portion of the jury verdict as to certain class members and entirely vacated the punitive damages award because of

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261. DEL. SUPER. CT. R. CIV. P. 23; *Mentis v. Del. Am. Life Ins. Co.*, No. C.A.98C-12-023WTQ, 2000 WL 973299, at \*8 (Del. Super. Ct. May 30, 2000) (noting Delaware adopted a class action procedural rule for its common-law courts in 1994 which now implicates the constitutional right to jury trial).

262. *McMahon v. New Castle Assocs.*, 532 A.2d 601, 607 (Del. Ch. 1987) (stating class action only maintained in equity if otherwise equitable); *Mentis*, 2000 WL 973299, at \*8 (denying motion for class certification, but noting that “[w]hen you move class actions from Chancery to Superior Court . . . [t]he State’s constitutional right of jury trial is implicated”).

263. FLA. CONST. art. I, § 22.

264. *Hawkins v. Rellim Inv. Co.*, 110 So. 350, 351 (Fla. 1926); *see also* *King Mountain Condo. Ass’n v. Gundlach*, 425 So. 2d 569, 569–70 (Fla. Dist. Ct. App. 1982) (concluding class action “did not have a constitutional right to a jury trial on their claim seeking disgorgement and restitution of alleged unjust enrichment”).

265. *Lanman Lithotech, Inc. v. Gurwitz*, 478 So. 2d 425, 427 n.4 (Fla. Dist. Ct. App. 1985).

266. *See id.* at 426–27.

267. *Id.* at 427.

268. 945 So. 2d 1246, 1256–58, 1276 (Fla. 2006) (per curiam) (reviewing a jury verdict awarding \$12.7 million in compensatory damages and \$145 billion in punitive damages).

due process concerns.<sup>269</sup> However, the court never questioned the right to jury trial in the class action and explicitly held that the defendants' state constitutional right to jury trial was not violated by permitting determination of common issues in one phase while decertifying the class for separate actions on individualized issues.<sup>270</sup> Similarly, the Florida Court of Appeals has upheld jury verdicts in several class actions without questioning the use of a jury.<sup>271</sup>

The Iowa Constitution provides, "The right of trial by jury shall remain inviolate."<sup>272</sup> The Iowa Supreme Court expressly declined to adopt *Ross v. Bernhard* in *Weltzin v. Nail*, holding that a shareholder derivative action is a case in equity regardless of the legal issues raised, and that no right to jury trial exists for cases in equity.<sup>273</sup> The court also seemed to recognize the Third Circuit's complexity exception,<sup>274</sup> but the Iowa Supreme Court in *Rieff v. Evans* stated that *Weltzin's* complexity discussion was dictum and expressly refused to adopt it in applying the state's jury-trial constitutional provision.<sup>275</sup> In *Rieff*, the plaintiff-shareholders of an insurance company filed direct claims in a class action and derivative claims on behalf of the company.<sup>276</sup> The Iowa Supreme Court held that there was no right to a jury trial on the derivative claims because derivative claims are equitable,<sup>277</sup> but that a right to jury trial did exist for the class claims that were legal.<sup>278</sup> Thus, Iowa recognizes a right to jury trial for legal claims in a class action, but not in a derivative action.

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269. *Id.* at 1264–65.

270. *Id.* at 1265, 1271.

271. *Southwin, Inc. v. Verde*, 806 So. 2d 586, 589 (Fla. Dist. Ct. App. 2002) (upholding a jury's verdict for homeowners' class action); *Tripp Constr., Inc. v. Verde*, 789 So. 2d 1171, 1172 (Fla. Dist. Ct. App. 2001) (per curiam) (revising the lower court's attorney fee award without questioning the jury verdict in favor of homeowners' class action against homebuilders for approximately \$5.2 million); *see also* *Griffith v. Quality Distrib., Inc.*, No. 2D17-3160, 2018 WL 3403537, at \*3 (Fla. Dist. Ct. App. July 13, 2018) ("Accordingly, the consequence of simply refusing to approve the [class action] settlement would most likely be to require the case to proceed to jury trial over the course of a year or two.") (quoting trial court's ruling).

272. IOWA CONST. art. I, § 9.

273. *Weltzin v. Nail*, 618 N.W.2d 293, 300–03 (Iowa 2000).

274. *See id.* at 301–02.

275. 672 N.W.2d 728, 731–32 (Iowa 2003).

276. *Id.* at 729–30.

277. *Id.*

278. *Id.* at 732–33.

In Louisiana, the right to jury trial in civil cases is provided by statute not the state constitution.<sup>279</sup> According to the Louisiana Code of Civil Procedure, “the right to trial by jury is recognized” and “the nature and amount of the principal demand shall determine whether any issue . . . is triable by jury,”<sup>280</sup> but jury trial is prohibited where no individual seeks more than \$50,000.<sup>281</sup> While the survey did not reveal any shareholder derivative case tried to a jury, several class actions have been tried to juries and the appellate courts did not question the use of juries in those cases.<sup>282</sup> In *Scott v. American Tobacco Co.*, the trial court allowed an advisory jury to hear a class action, but the Louisiana Court of Appeals amended the judgment because the jury may not be considered advisory.<sup>283</sup>

The Massachusetts Constitution grants a jury trial right “[i]n all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced.”<sup>284</sup> The Massachusetts Supreme Judicial Court has stated that the exception to the right of jury trial means no right to jury trial exists for those claims that are “analogous, in either subject matter or remedy sought, to cases within the court’s equity jurisdiction” in 1780.<sup>285</sup> While a judge has broad discretion to submit equity claims to a jury, once a judge does so, the jury’s findings become binding and conclusive.<sup>286</sup> Massachusetts does not recognize any right to jury trial in derivative actions. In *Demoulas v. Demoulas Super Markets, Inc.*, the Massachusetts Supreme Judicial Court expressly declined to adopt *Ross v. Bernhard* and held that no constitutional right to trial by jury exists because a shareholder derivative action arises in

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279. *Riddle v. Bickford*, 2000-2408, p. 5 (La. 5/15/2001); 785 So. 2d 795, 799.

280. LA. CODE CIV. PROC. ANN. art. 1731 (2018).

281. *Id.* art. 1732 (listing suits in which a trial by jury shall not be available).

282. *See In re New Orleans Train Car Leakage Fire Litig.*, 2000-0479, pp. 2, 55 (La. App. 4 Cir. 6/27/2001); 795 So. 2d 364, 370, 398 (affirming judgment on jury verdict in class action); *Rivera v. United Gas Pipeline Co.*, 96-502, pp. 4, 17 (La. App. 5 Cir. 6/30/97); 697 So. 2d 327, 332-33, 339 (class action suit tried to jury); *see also* *Cash v. McGregor*, 31,537, pp. 5-7 (La. App. 2 Cir. 2/24/99); 730 So. 2d 497, 498-501 (reversing jury’s verdict in class action that found driver was negligent because insufficient evidence supported the jury’s verdict).

283. 2004-2095, pp. 3, 5 (La. App. 4 Cir. 2/7/07); 949 So. 2d 1266, 1272-73.

284. MASS. CONST. pt. 1, art. XV.

285. *Rosati v. Bos. Pipe Covering, Inc.*, 749 N.E.2d 143, 145 (Mass. 2001) (quoting *Dalis v. Buyer Advert., Inc.*, 636 N.E.2d 212, 223 (Mass. 1994)).

286. *See* *Lampert, Hausler & Rodman, P.C. v. Gallant*, No. 05-P-1394, 2006 WL 2336920, at \*2 (Mass. App. Ct. Aug. 11, 2006) (unpublished table decision) (noting a trial court’s broad discretionary power to submit equity claims to a jury).

equity.<sup>287</sup> However, Massachusetts may recognize a jury trial right in class actions. In *Sullivan v. First Massachusetts Financial Corp.*, the Massachusetts Supreme Court partially affirmed a jury verdict entered in a class action filed on behalf of minority shareholders in a bank.<sup>288</sup>

The Minnesota Constitution preserves the right to a jury trial as it existed when the constitution was adopted.<sup>289</sup> Interpreting the constitution, the Minnesota Supreme Court has held a right to jury trial exists when the “complaint is legal in nature and character,”<sup>290</sup> but “the mere fact that monetary relief is sought does not automatically create a right to a jury trial.”<sup>291</sup> In an equitable action, a district court has discretion to submit issues of fact to a jury.<sup>292</sup> The survey did not reveal any shareholder derivative action tried to a jury, but a clear right to jury trial does exist for class actions. The Minnesota Court of Appeals has held that legal claims in class actions are entitled to a jury,<sup>293</sup> and it has affirmed a jury verdict in a class action.<sup>294</sup>

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287. *Demoulas v. Demoulas Super Mkts., Inc.*, 677 N.E.2d 159, 178–79 (Mass. 1997).

288. 569 N.E.2d 814, 818–20 (Mass. 1991).

289. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 149–50 (Minn. 2001) (“[Prior opinions] make it clear that a party is not entitled to a jury trial if that same type of action did not entitle a party to a jury trial at the time the Minnesota Constitution was adopted.”); see also MINN. CONST. art. 1, § 4 (“The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.”).

290. *Olson*, 628 N.W.2d at 154.

291. *Id.* (citing *Swanson v. Alworth*, 209 N.W. 907, 909 (Minn. 1926)); cf. *Sonenstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1, 4 (Minn. Ct. App. 1985) (holding no right to jury trial in class action because damages claim was “intertwined with the request for injunctive relief”).

292. *Olson*, 628 N.W.2d at 153; see also *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 778 (Minn. Ct. App. 2006) (stating trial court may empanel an advisory jury for equitable claim but jury’s findings are not binding); *Uselman v. Uselman*, 464 N.W.2d 130, 137 (Minn. 1990) (holding trial court may submit issues of fact in equitable action to a jury), *superseded by statute on other grounds as recognized in Radloff v. First Am. Nat’l Bank of St. Cloud*, 470 N.W.2d 154, 159 (Minn. Ct. App. 1991) (noting statutory change regarding notice of sanctions).

293. See *Hallen v. Hometown Am., LLC*, No. A06-1545, 2007 WL 2472337, at \*3 (Minn. Ct. App. Sept. 4, 2007) (*Cimarron II*) (denying class of tenants a jury trial because no right to a jury trial for damages claim when “intertwined with a request for injunctive relief”).

294. *Cavanaugh v. Hometown Am., LLC*, No. A05-595, 2006 WL 696259, at \*3 (Minn. Ct. App. May 24, 2006) (*Cimarron I*) (affirming jury verdict for class of tenants alleging a mobile home landlord violated the Manufactured Home Park Rental Law).

The Missouri Supreme Court has held that the Missouri Constitution preserves the right to jury trial as it existed in 1820.<sup>295</sup> “An action that is equitable in nature, as viewed in historical perspective and with respect to the equitable remedy sought, does not come within the jury trial guarantee.”<sup>296</sup> By contrast, an action for only money damages is generally one at law.<sup>297</sup> The survey did not reveal a derivative action that has been tried to a jury, but Missouri has recognized a right to jury trial in class actions. In *Kenton v. Hyatt Hotels, Corp.*, the Missouri Supreme Court reinstated the jury’s verdict in a class action for injuries suffered by class members after skywalks in a Kansas City hotel collapsed.<sup>298</sup> Similarly, the Missouri Court of Appeals has reinstated a jury verdict in a class action seeking damages for breach of contract against an automobile insurer.<sup>299</sup>

The Nevada Constitution preserves the right to jury trial as it existed when the constitution was adopted in 1864.<sup>300</sup> The right extends not only to historical English common law, but also the common law that existed in Nevada at the time.<sup>301</sup> The survey did not reveal any derivative action that has been tried to a jury. However, Nevada appears to recognize a right to jury trial in class actions because the Nevada Supreme Court has reviewed jury verdicts in several class actions without questioning the use of the jury.<sup>302</sup>

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295. *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 85–86 (Mo. 2003) (en banc); *see also* MO. CONST. art. I, § 22(a) (“That the right of trial by jury as heretofore enjoyed shall remain inviolate . . .”).

296. *Diehl*, 95 S.W.3d at 85.

297. *Id.* at 86.

298. 693 S.W.2d 83, 85, 98 (Mo. 1985) (en banc).

299. *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 679, 692 (Mo. Ct. App. 2009); *see also* *Hurst v. Nissan N. Am., Inc.*, WD 78665, 2016 WL 1128297, at \*1 (Mo. Ct. App. Mar. 22, 2016) (reversing judgment entered on jury verdict in a class action brought by vehicle owners against manufacturer).

300. *Aftercare of Clark Cty. v. Justice Court of Las Vegas Twp.*, 82 P.3d 931, 932 (Nev. 2004) (en banc) (per curiam); *see also* NEV. CONST. art. I, § 3 (“The right of trial by Jury shall be secured to all and remain inviolate forever . . .”).

301. *Aftercare of Clark Cty.*, 82 P.3d at 932.

302. *Reno Hilton Resort Corp. v. Verderber*, 106 P.3d 134, 135 (Nev. 2005) (per curiam) (dismissing interlocutory appeal from order denying a new trial after jury verdict in Phase 1 of class action as to class-wide issues of liability and punitive damages); *Schouweiler v. Yancey Co.*, 712 P.2d 786, 787, 791 (Nev. 1985) (per curiam) (affirming jury verdict in class action for negligent design and construction but remanding on attorney’s fees); *Deal v. 999 Lakeshores Ass’n*, 579 P.2d 775, 777, 780 (Nev. 1978) (affirming jury verdict for the plaintiffs in a class action of condo owners alleging various tort theories against the developer and contractor); *cf.* *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 535–

The New Hampshire Constitution grants a right to a jury trial “[i]n all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed \$1500 and no title to real estate is involved.”<sup>303</sup> The New Hampshire Supreme Court has held that only legal claims may be tried to a jury,<sup>304</sup> and that the right to jury trial “remains intact even though a legal action to which the right attaches is joined with an action in equity.”<sup>305</sup> While the New Hampshire Supreme Court does not recognize a jury trial right for a derivative action because it is “an action in equity,” it permits use of an advisory jury.<sup>306</sup> The New Hampshire legislature had previously permitted class actions only under its Consumer Protection Act, but since 2013 a New Hampshire Superior Court rule establishes when parties may bring class actions.<sup>307</sup> Although the survey did not find a class action tried to a jury, one New Hampshire Superior Court opinion may support a jury trial right in class actions. In *Nicols v. General Motors Corp.*, the court rejected a plaintiff’s attempt “to consolidate four separate class actions” and noted that consolidation of the four class actions would “confuse and mislead the jury,”<sup>308</sup> which suggests that a jury trial is possible in a class action.

The Oklahoma Constitution preserves the right to jury trial as it existed at common law,<sup>309</sup> and “a party’s right to a jury trial is determined by the character of the action and of the issues framed by the pleadings.”<sup>310</sup> No

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36 (Nev. 2005) (en banc) (reversing jury verdict because class certification was not warranted).

303. N.H. CONST. pt. 1, art. XX.

304. See *McElroy v. Gaffney*, 529 A.2d 889, 891 (N.H. 1987) (stating the constitution “affords the unqualified right to a trial by jury in actions at common law, as it was understood to apply at common law prior to 1784” and has no application “to purely equitable proceedings”).

305. *Id.*

306. *Id.* at 892.

307. *Royer v. State Dep’t of Emp’t Sec.*, 394 A.2d 828, 833–34 (N.H. 1978) (per curiam) (Douglas, J., concurring); see also N.H. REV. STAT. ANN. § 358-A:10-a (2019); N.H. R. SUPER. CT. 16 (permitting class actions).

308. No. 99-C-566, 1999 WL 33292839, at \*2 (N.H. Super. Ct. Dec. 13, 1999).

309. *Vogel v. Corp. Comm’n of Okla.*, 1942 OK 14, ¶¶ 12–14, 121 P.2d 586, 589; see also OKLA. CONST. art. II, § 19 (“The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Thousand Five Hundred Dollars (\$1,500.00) . . .”).

310. *Okla. Oil & Gas Expl. Drilling Program 1983-A v. W.M.A. Corp.*, 1994 OK CIV APP 11, ¶ 20, 877 P.2d 605, 612 (citing *Cheatham v. Bynum*, 1977 OK CIV APP 36, ¶ 2, 568 P.2d 649, 650).

right to jury trial exists in an equitable action, and joinder of “legal and equitable issues does not require a jury trial if the equitable issues are paramount or the legal issues incidental to or dependent upon the equitable issues.”<sup>311</sup> The Oklahoma Supreme Court has held that a derivative suit is only maintainable in equity and therefore possesses no right to a jury trial.<sup>312</sup> By contrast, Oklahoma may recognize a right to jury trial in class actions because the Oklahoma Supreme Court has upheld jury verdicts in several class actions without questioning the use of a jury. In *Tibbetts v. Sight ‘n Sound Appliance Centers, Inc.*, the Oklahoma Supreme Court upheld a jury verdict finding that the defendant was guilty of bait-and-switch advertising and awarding zero damages to the class, but reversed the trial court’s judgment awarding plaintiff attorney fees.<sup>313</sup> Similarly, in *Krug v. Helmerich & Payne, Inc.*, the Oklahoma Supreme Court partially affirmed a jury verdict in favor of a class of royalty owners for breach of contractual and fiduciary duties against the lease operator for allowing uncompensated drainage of natural gas from the leases.<sup>314</sup>

The Oregon Constitution states that “[i]n all civil cases the right of Trial by Jury shall remain inviolate”<sup>315</sup> and that “[i]n actions at law, where the value in controversy shall exceed \$750, the right of trial by jury shall be preserved.”<sup>316</sup> According to the Oregon Supreme Court, the state constitution guarantees a right to jury trial for those cases where the right was conferred at common law when the state constitution was adopted and for cases similar in nature.<sup>317</sup> But it “does not give a party a right to a jury trial for claims or defenses that would have been tried to a court of equity in

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311. *Id.*

312. *Warren v. Century Bankcorp., Inc.*, 1987 OK 14, ¶ 1 & n.1, 741 P.2d 846, 847 & n.1; *see also* *Steinway v. Griffith Consol. Theatres*, 1954 OK 156, ¶¶ 4–9, 273 P.2d 872, 877–78 (holding Oklahoma does not recognize a right to jury trial in shareholder derivative actions because such actions and the right to maintain them are only recognizable at equity).

313. 2003 OK 72, ¶¶ 25–27, 77 P.3d 1042, 1045, 1054; *cf.* *Bouziden v. Alfalfa Elec. Coop., Inc.*, 2000 OK 50, ¶¶ 1, 34–36, 16 P.3d 450, 453, 460 (reversing the jury verdict in a class action for damages from a wildfire because the existence of independent contractor status was a question for the jury).

314. *Krug v. Helmerich & Payne, Inc.*, 2013 OK 104, ¶¶ 42–46, 320 P.3d 1012, 1023–24.

315. OR. CONST. art. I, § 17.

316. *Id.* art. VII (amended), § 3.

317. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1031 (Or. 2016) (citing *M.K.F. v. Miramontes*, 287 P.3d 1045 (Or. 2012) (en banc)).



1857 when the Oregon Constitution was adopted.”<sup>318</sup> It is unclear whether Oregon recognizes a right to jury trial in derivative actions. An Oregon Court of Appeals opinion stated that a derivative suit is in equity,<sup>319</sup> which would suggest that no right to jury trial exists, but the survey found no direct precedent. As to class actions, the Oregon Supreme Court has implicitly recognized a right to jury trial for legal claims in class actions. In *Strawn v. Farmers Insurance Co. of Oregon*, the Oregon Supreme Court affirmed a jury verdict for a class of insureds alleging fraud and breach of contract claims against an insurance company, without questioning the use of a jury.<sup>320</sup>

The Pennsylvania Constitution states, “Trial by jury shall be as heretofore, and the right thereof remain inviolate.”<sup>321</sup> The state does not recognize a right to jury trial in a derivative action, because it is an equitable action to enforce a right that belongs to the corporation.<sup>322</sup> By contrast, Pennsylvania may recognize a right to jury trial in class actions based on two recent cases. In *Signora v. Liberty Travel, Inc.*, the Pennsylvania Superior Court upheld a jury verdict awarding damages in a class action.<sup>323</sup> Similarly, in *Braun v. Wal-Mart Stores, Inc.*, the Pennsylvania Supreme Court affirmed a jury verdict in favor of hourly employees in a class action brought against a retailer for breach of contract and wage violations.<sup>324</sup>

South Carolina’s Constitution provides, “The right of trial by jury shall be preserved inviolate.”<sup>325</sup> The South Carolina Supreme Court has reasoned

318. *Id.* (citing *McDowell Welding & Pipefitting v. U.S. Gypsum Co.*, 193 P.3d 9 (Or. 2008)); *Deane v. Willamette Bridge Co.*, 29 P. 440 (Or. 1892); *Tribou v. Strowbridge*, 7 Or. 159 (1879)).

319. *Hoekstre v. Golden B. Prods., Inc.*, 712 P.2d 149, 152 (Or. Ct. App. 1985) (citing *Krause v. Mason*, 537 P.2d 105 (Or. 1975)); *Davis v. Hofer*, 63 P. 56 (Or. 1900) (en banc)) (“A shareholder’s derivative suit is in equity.”).

320. 258 P.3d 1199, 1205, 1219 (Or. 2011); *see also Migis v. Autozone, Inc.*, 387 P.3d 381, 385–86 (Or. Ct. App. 2016), *affirmed on rehearing*, 396 P.3d 309 (Or. Ct. App. 2017) (affirming jury verdict in class action by current and former employees on wage violation claims but reversing on other matters).

321. PA. CONST. art. I, § 6.

322. *See Hess v. M. Aaron Co.*, 4 Pa. D. & C.3d 153, 160–61 (Ct. Com. Pl. 1977).

323. 2005 PA Super 366, ¶¶ 2, 31, 886 A.2d 284, 288–89, 299, *overruled on other grounds by Andrews v. Cross Atl. Capital Partners, Inc.*, 2017 PA Super 72, 158 A.3d 123; *see also Oppenheimer v. York Int’l*, No. 4348, 2002 WL 31409949, at \*8 (Pa. Com. Pl. Oct. 25, 2002) (sustaining motion to strike the jury demand in class action because no right to jury trial for injunctive relief claim or statutory claim of unfair trade practices).

324. 106 A.3d 656, 667 (Pa. 2014) (per curiam).

325. S.C. CONST. art. I, § 14.

that “[t]he character of an action is determined by the main purpose of the complaint,”<sup>326</sup> and that actions at law are triable to a jury while equitable actions are not.<sup>327</sup> The South Carolina Supreme Court does not recognize a right to jury trial in shareholder derivative actions and has effectively rejected the *Ross v. Bernhard* approach.<sup>328</sup> The court has held that its state constitution mandates the “right of jury trial shall be preserved only in those cases in which the parties were entitled to it under the law or practice existing at the time of the adoption of the constitution,” and thus no jury trial exists in shareholder derivative suits.<sup>329</sup> Similarly, in *Anthony v. Padmar, Inc.*, the South Carolina Court of Appeals stated that a shareholder derivative suit is equitable and should be tried by the court.<sup>330</sup> As for class actions, no clear precedent was found, but two cases offer weak support for a jury trial right. In *Salmonsens v. CGD, Inc.*, the South Carolina Supreme Court rejected opt-in class actions finding an opt-in provision “effectively denies [putative class members] a trial by jury.”<sup>331</sup> In *The Gates at Williams-Brice Condominium Ass’n v. DDC Construction, Inc.*, the South Carolina Court of Appeals reversed the trial court’s denial of defendants’ motion for a nonjury trial based on a waiver in a master deed but did not hold that class actions are never entitled to a jury trial.<sup>332</sup>

The Tennessee Constitution preserves the right to jury trial as it existed at common law in 1796,<sup>333</sup> and Tennessee continues to maintain separate courts of law and equity.<sup>334</sup> Tennessee does not appear to recognize a right to jury trial in derivative actions. In *McRedmond v. Estate of Marianelli*, a shareholder derivative suit was tried to a jury in the Court of Chancery.<sup>335</sup> Because the Chancellor entered the judgment, “which adopted the verdict

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326. *Lund v. Gray Line Water Tours, Inc.*, 253 S.E.2d 503, 504 (S.C. 1979) (per curiam) (quoting *Pate v. Thomas*, 204 S.E.2d 571, 571 (S.C. 1974)).

327. *Pelfrey v. Bank of Greer*, 244 S.E.2d 315, 315 (S.C. 1978) (“It is undisputed that, if the action is in equity, it is to be tried by the court; if at law, it is triable by a jury . . .”).

328. *Id.* at 316–17.

329. *Id.* at 316.

330. 465 S.E.2d 745, 750–51 (S.C. Ct. App. 1995).

331. *Salmonsens v. CGD, Inc.*, 661 S.E.2d 81, 90–91 (S.C. 2008).

332. 792 S.E.2d 240, 248–51 (S.C. Ct. App. 2016), *vacated pursuant to settlement*, 801 S.E.2d 400 (S.C. 2017).

333. *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 88–89 (Tenn. 1992); *see also* TENN. CONST. art. I, § 6 (“That the right of trial by jury shall remain inviolate . . .”).

334. *See* TENN. CODE ANN. § 16-11-101 (West 2019).

335. No. M2004-01496-COA-R3-CV, 2006 WL 2805158, at \*1 (Tenn. Ct. App. Sept. 29, 2006), *overruled on other grounds by* *House v. Estate of Edmondson*, 245 S.W.3d 372 (Tenn. 2008).

of the jury as the judgment of the trial court,” the jury appears to have been advisory rather than as of right.<sup>336</sup> One precedent suggests that Tennessee may recognize a jury trial right in class actions. In *Freeman v. Blue Ridge Paper Products, Inc.*, the Tennessee Court of Appeals upheld a jury verdict in a class action seeking damages from water pollution without questioning the use of a jury.<sup>337</sup>

The Utah Constitution preserves the right to jury trial as it existed at common law when the constitution was adopted.<sup>338</sup> The survey found no case law on the right to jury trial in derivative actions, but one class action has been tried to a jury. In *Ford v. American Express Financial Advisors, Inc.*, the Utah Supreme Court reviewed a jury verdict awarding damages in a breach of contract class action but did not question whether the jury trial had been proper.<sup>339</sup> This precedent may support a right to jury trial in future class actions.

The Washington Constitution preserves the right to jury trial that existed when it was adopted in 1889, so only actions “purely legal in nature” possess such right.<sup>340</sup> The Washington Supreme Court has stated that “[t]he overall nature of the action is determined by considering all the issues raised by all of the pleadings” and that a court has wide discretion in determining whether a case is primarily equitable or legal in nature.<sup>341</sup> In 1933, the Washington Supreme Court held that shareholder derivative actions must be brought in equity and cannot be maintained at law,<sup>342</sup> which suggests no right to jury trial exists for derivative actions and no recent case was found. As to class actions, Washington courts have reviewed jury

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336. *See id.* at \*4.

337. 229 S.W.3d 694, 701, 713 (Tenn. Ct. App. 2007); *see also* Michelhaugh v. Consol. Nuclear Sec., LLC, No. E2016-01075-COA-R3-CV, 2016 WL 6946680, at \*7 (Tenn. Ct. App. Nov. 28, 2016) (reversing dismissal of class action requesting a jury trial but not discussing whether jury trial was allowable).

338. *Jensen v. State Tax Comm’n*, 835 P.2d 965, 969 (Utah 1992); *Hyatt v. Hill*, 714 P.2d 299, 300 (Utah 1986) (stating the constitution “guaranteed the right to trial by jury on legal issues in civil cases”); *Benson v. Utah Labor Comm’n*, 2018 UT App 228, ¶ 2, 437 P.3d 1253, 1255 (per curiam) (quoting *Jensen*, 835 P.2d at 969); *see also* UTAH CONST. art. I, § 10 (“A jury in civil cases shall be waived unless demanded.”).

339. *Ford v. Am. Express Fin. Advisors, Inc.*, 2004 UT 70, ¶¶ 1–2, 42, 98 P.3d 15, 18, 27.

340. *Allard v. Pac. Nat’l Bank*, 663 P.2d 104, 108 (Wash. 1983) (en banc) (citing *Brown v. Safeway Stores, Inc.*, 617 P.2d 704, 708 (Wash. 1980) (en banc)); *see also* WASH. CONST. art. I, § 21 (“The right of trial by jury shall remain inviolate . . .”).

341. *Brown*, 617 P.2d at 708 (citing *Seattle v. Pacific States Lumber Co.*, 7 P.2d 967 (Wash. 1932); *Santmeyer v. Clemmances*, 266 P. 148 (Wash. 1928)).

342. *Moore v. Los Lugos Gold Mines*, 21 P.2d 253, 263 (Wash. 1933).

verdicts in class actions without questioning the use of a jury. In *Trimble v. Holmes Harbor Sewer District*, the Washington Court of Appeals affirmed the jury verdict in a class action by investors who alleged the defendant violated state securities laws.<sup>343</sup> In *Braam ex rel. Braam v. State*, the Washington Supreme Court vacated the jury verdict in a class action against the state Department of Social and Health Services regarding the placement of foster children but did not state that a jury trial was erroneous.<sup>344</sup> In *Sitton v. State Farm Mutual Automobile Insurance Co.*, the court stated that a trial plan allowing jury trial for some of the issues raised in class action was possible.<sup>345</sup>

The West Virginia Constitution preserves the right to jury trial as it existed at common law when the state constitution was adopted.<sup>346</sup> In a modified historical test, West Virginia courts look not to the cause of action, but whether the nature of the injury and the relief sought would warrant a jury trial.<sup>347</sup> Research did not uncover any shareholder derivative action tried to a jury, but the West Virginia Supreme Court has upheld jury verdicts in two class actions. The court affirmed the jury verdict in a class action against cigarette manufacturers for medical monitoring expenses without questioning the use of a jury.<sup>348</sup> Likewise, the court upheld a jury verdict in a class action brought by commissioned salespeople against a car dealership for statutory wage violations.<sup>349</sup>

### *III. Arguments for States That Have Not Expressly Addressed the Right to Jury Trial in Class and Derivative Actions*

Part II aimed to help attorneys and their clients understand the current law concerning the right to jury trial issue within class and derivative

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343. No. 59054-5-I, 2007 WL 959899, at \*1 (Wash. Ct. App. Apr. 2, 2007).

344. 81 P.3d 851, 854, 865 (Wash. 2003) (en banc).

345. 63 P.3d 198, 206–07 (Wash. Ct. App. 2003) (“State Farm has not shown that a litigation plan bifurcating the trial is inherently unmanageable.”).

346. *Perilli v. Bd. of Educ. Monongalia Cty.*, 387 S.E.2d 315, 317 (W. Va. 1989) (holding that the jury trial right for a new cause of action is determined by examining “whether the nature of the injury and the related relief would have merited a jury trial in 1880.”); see also W. VA. CONST. art. III, § 13 (“In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons.”).

347. *Perilli*, 387 S.E.2d at 317.

348. *In re Tobacco Litig.*, 600 S.E.2d 188, 193–94 (W. Va. 2004) (per curiam).

349. *Robertson v. Opequon Motors, Inc.*, 519 S.E.2d 843, 845, 852 (W. Va. 1999) (per curiam).

actions in state courts. While a few states continue to deny any right to jury trial in these actions, some courts now allow a jury trial right to both actions, and other states seem to permit a jury trial only in class actions. As Part II also demonstrated, many state courts have not clearly decided the right to jury trial issue in class and derivative actions. Without clear precedent, attorneys and their clients face uncertainty as to when they may demand a jury trial. While uncertainty as to how the substantive law will apply to the facts always exists in litigation, the procedural law should be certain.

The easiest and quickest way to achieve certainty would be for the Supreme Court of the United States to hold that the Seventh Amendment applies to the states. All states would then be required to follow *Ross v. Bernhard*, and a right to a jury trial would exist for legal claims asserted in class and shareholder derivative actions. However, for more than a century, the Court has expressly held that the Seventh Amendment does not apply to the states, which may suggest that the Court is unlikely to revisit the issue.<sup>350</sup>

Alternatively, state legislatures could enact statutes that extend the right to jury trial to legal claims asserted in class and shareholder derivative actions. However, state legislatures are often slow to act, and it is doubtful legislators would find this an urgent issue since it is unlikely to garner the attention of voters or the media.

The most likely way for states to resolve the jury trial issue is through case law. If the highest court in a state adopts the reasoning of *Ross v. Bernhard* through a common-law interpretation of its state constitution, then a jury trial right would exist for legal issues in both derivative and class actions. If the state's highest court rejects *Ross*, however, no right to jury trial would exist for those actions. Even ignoring *Ross*, a state's highest court could adopt its own rationale for or against the right to jury trial in these representative actions, which would also provide certainty for attorneys and their clients.

Before a state's highest court can decide the right to jury trial for class and derivative actions, however, parties and their attorneys must raise the right to jury trial issue at trial and on appeal. Thus, Part III provides attorneys with relevant legal arguments to assert in those states that have not expressly addressed the right to jury trial in both class and derivative actions. For states that have allowed jury trials in class actions but denied

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350. See, e.g., *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 220 (1916); *Edwards v. Elliott*, 88 U.S. 532, 557–58 (1894).

jury trials in derivative actions, Section III.A argues that states should recognize the same right to jury trial in both types of actions. For those states that have denied any right to jury trial in derivative actions, or in both types of actions, Section III.B argues that states should recognize a right to jury trial for legal claims in both class and derivative actions.

*A. Shareholder Derivative Lawsuits and Class Actions Should Possess the Same Jury Trial Rights*

Shareholder derivative lawsuits and class actions are both forms of representative litigation. In the United States, representative litigation evolved from the English “necessary parties” rule and its exceptions.<sup>351</sup> Courts in the United States have always permitted class and shareholder derivative actions in certain circumstances.<sup>352</sup> Because both actions are forms of representative litigation with a shared history and similar purpose, state courts should provide the same right to jury trial to class and derivative actions.

For the first 150 years of the United States, courts permitted a shareholder to bring a lawsuit on behalf of all shareholders when the corporation’s board of directors was incapable of seeking redress or improperly refused to seek redress.<sup>353</sup> While acknowledging that the corporation was normally the proper party to bring suit against its directors and officers for mismanagement or fraud, courts recognized that the corporation’s decision to sue was controlled by its officers and directors. Because officers and directors were unlikely to sue themselves and because their actions harmed shareholders,<sup>354</sup> courts of equity permitted a shareholder to bring a lawsuit on behalf of all shareholders.<sup>355</sup> Today, courts commonly state that a shareholder may bring a derivative lawsuit on behalf of the corporation.<sup>356</sup> However, this change in terminology alone does not suggest a reason to deny a right to jury trial to legal claims asserted within shareholder derivative lawsuits. The relationship between the corporation and its shareholders has not changed, and the shareholder derivative action is still a form of representative litigation that shareholders are entrusted to file when certain prerequisites are satisfied. Any procedural or substantive

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351. Ann M. Scarlett, *Shareholder Derivative Litigation’s Historical and Normative Foundations*, 61 BUFF. L. REV. 837, 860–86 (2013).

352. *See id.*

353. *Id.* at 887–91.

354. *Id.* at 890–91.

355. *Id.* at 890.

356. *Id.* at 893–94.

hurdles that courts now impose on a shareholder derivative action may arguably narrow the circumstances for such an action, but do not alter its nature as representative litigation.

Similarly, courts in the United States have always permitted some form of class actions. Federal Rule of Civil Procedure 23(b)(1) permits class actions to ensure that similarly situated individuals are treated alike and to prevent varying adjudications with respect to individual class members from establishing incompatible standards of conduct for the party opposing the class.<sup>357</sup> Rule 23(b)(2) permits class actions seeking primarily injunctive or declaratory relief, such as civil rights cases.<sup>358</sup> The most common class actions today occur under Rule 23(b)(3), and are either mass tort class actions where each class member was harmed by a common source or consumer class actions where each class members' claim is too small in value to pursue individually.<sup>359</sup>

By its nature, a class action is always a form of representative litigation. When a court certifies a class, part of that certification process involves approving a named plaintiff (or plaintiffs) to represent the class after determining that the named plaintiff's claims are typical of the class and that the named plaintiff is an adequate representative of the class.<sup>360</sup> The named plaintiff then has the responsibility to represent the interests of all the individual class members throughout the litigation.

In addition, shareholder derivative actions are not more complicated than class actions, and therefore complexity is an insufficient basis for granting different jury trial rights to derivative and class actions. Though some judges and scholars have argued that shareholder derivative actions are too complex for juries,<sup>361</sup> denying any right to a jury trial in shareholder derivative actions is inconsistent with the use of juries in class actions and

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357. FED. R. CIV. P. 23(b)(1).

358. FED. R. CIV. P. 23(b)(2).

359. See FED. R. CIV. P. 23(b)(3) (stating the court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"); Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 404 (2014) (stating that "class litigation now is dominated by Rule 23(b)(3) damage class actions"); see also *id.* at 439 ("With the advent of the mass tort litigation crisis in the 1980s and 1990s, followed by the wave of consumer class actions in the twenty-first century, damage class actions now dominate the litigation landscape.").

360. FED. R. CIV. P. 23(a).

361. See generally *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); Chamberlin, *supra* note 66.

other cases. For example, individual claims for medical malpractice, legal malpractice, intellectual property, antitrust, or engineering and construction defects involve complicated issues about which jurors lack expertise, but our judicial system regularly entrusts those claims to juries.<sup>362</sup> Courts allow the juries in these cases to evaluate the evidence, including the consideration of expert testimony and the weighing of conflicting testimony, to determine whether the defendant violated a particular legal standard of conduct.<sup>363</sup> Thus, courts trust jurors to make rational decisions in highly complex cases.

Similarly, class actions may involve complicated legal issues, such as liability for defective medical devices, pharmaceuticals, or other products. They also necessarily involve numerous plaintiffs, and often multiple defendants. Typical claims in a shareholder derivative action involve alleged breaches of fiduciary duties by the directors in making a business decision, but these claims are generally less complicated than medical malpractice or products liability cases. Derivative actions also typically involve fewer parties than class actions. If courts are willing to entrust the resolution of legal issues in complex individual cases and class actions to juries, the same should be true for shareholder derivative actions. Therefore, if a state recognizes a right to a jury trial in class actions, then the state should grant the same right for shareholder derivative actions.

*B. A Right to Jury Trial Should Exist for Legal Claims in Both Shareholder Derivative and Class Actions*

Class and shareholder derivative actions should both possess a right to jury trial for legal claims. Juries are entrusted to resolve legal claims in individual actions that are virtually identical to shareholder derivative and class actions. When a corporation, rather than its shareholders, litigates a matter, the corporation is entitled to a jury trial on any legal claims.<sup>364</sup> As the Supreme Court held in *Ross v. Bernhard*, “the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury.”<sup>365</sup> An

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362. See *Soderbeck v. Burnett Cty.*, 752 F.2d 285, 289 (7th Cir. 1985) (“Rightly or wrongly, our system commits the decision of complex as well as simple facts, facts tinged with legal or policy significance (such as negligence) as well as the who-did-what-to-whom facts that can be found without any instruction in the law, to the jury in cases in which a right to a jury trial is given.”).

363. Scarlett, *supra* note 8, at 167–68.

364. See *Ross v. Bernhard*, 396 U.S. 531, 533–34 (1970).

365. *Id.* at 532–33.



action is derivative because the board of directors is disabled in some way from bringing the claim. If a jury is trusted with the power to hear legal claims when pursued directly by the corporation, it is illogical to deny a right to jury trial when a shareholder pursues the exact same claims derivatively. Further, to deny a jury trial because an action is brought derivatively harms the jury trial rights of the corporation on whose behalf the action is pursued. Shareholder derivative actions should possess the same right to jury trial as cases pursued directly by corporations, because the corporation is the beneficial party in both.

Likewise, class actions should possess the same right to jury trial as actions brought by individual class members. If an individual would have a right to jury trial, it is irrational to deny a right to jury trial when the same claim is brought by a class. Denying a jury trial right to class actions also harms the jury trial rights of the individual class members. That harm is magnified in those class actions in which the plaintiff class members have no right to opt-out of the class.<sup>366</sup>

Extending the right to jury trial in both class and shareholder derivative actions may also eliminate some forum shopping, because the right to jury trial is one factor that may influence where plaintiffs choose to file these actions. As seen in the Wells Fargo class and derivative actions,<sup>367</sup> the plaintiffs in each case chose to file in federal court. The right to jury trial that is available for legal claims in federal court may have been a factor that influenced their choice. Given that Wells Fargo has banks, employees, customers, and shareholders across the country, those cases likely could have been filed in numerous state courts. However, the uncertainty of the right to jury trial in those states may have deterred the plaintiffs from filing in state court. The right to jury trial (or lack thereof) may also influence companies and their directors to seek the adoption of a bylaw provision designating one state's courts as the exclusive forum for any shareholder litigation involving the company.

Admittedly, the right to a jury trial is not the only basis underlying forum shopping, and all lawsuits likely involve some degree of forum shopping.<sup>368</sup> Yet, procedural differences can lead to differences in the ultimate outcome

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366. See FED. R. CIV. P. 23(b).

367. See *supra* notes 2–5 and accompanying text.

368. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 121–22 (2002); see also Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 n.1 (1995) (calling forum shopping a “national legal pastime”); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 571 (1989).

of the case<sup>369</sup> and inequality in the treatment of plaintiffs. When similar actions possess differing rights to jury trial based solely on the courts in which such actions are filed, some plaintiffs will get their case decided by a jury of their peers while others are denied that opportunity. If state courts adopted the right to jury trial in class and shareholder derivative actions, some plaintiffs may choose not to file their actions in federal court which would lessen vertical forum shopping.

Different rules for the right to a jury trial also incentivize plaintiff-shareholders to creatively plead their cases. For instance, when a plaintiff cannot file a shareholder derivative action in a court that would permit a jury trial, that plaintiff has an incentive to plead that the claims are not derivative but rather direct, which will provide the right to jury trial for any legal issues. In a shareholder derivative lawsuit, the injury was to the corporation and any recovery belongs to the corporation. By contrast, in a direct shareholder lawsuit, the injury is to the shareholder and the recovery belongs to the shareholder. Nevertheless, no substantive difference in the merits exists between direct and derivative actions based on the same facts, so the right to jury trial should not differ.

#### *V. Conclusion*

As this Article has demonstrated, many state courts have not expressly decided the right to jury trial in shareholder derivative and class actions. As a result, attorneys and their clients face uncertainty when bringing these actions. A state can provide clarity about the right to jury trial in class and shareholder derivative actions through an opinion of the state's highest court, a statutory provision, or a rule of procedure.

In clarifying the right to jury trial for class and shareholder derivative actions, states should treat both the same. Because both actions are forms of representative litigation that share a common history and fulfill a similar purpose, no rational basis exists for granting different jury trial rights in the two types of representative litigation. Although some courts have found that shareholder derivative actions are too complex for juries to decide, derivative actions are no more complex than class actions or individual actions routinely entrusted to juries.

In choosing the right to jury trial for shareholder derivative and class actions, state courts should grant the same right to jury trial as in actions brought directly by the represented parties (the corporation in a derivative

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369. Kimberly A. Moore & Francesco Parisi, *Rethinking Forum Shopping in Cyberspace*, 77 CHI.-KENT L. REV. 1325, 1331 (2002).

action and an individual class member in a class action). A shareholder derivative action is derivative solely because the directors possess a conflict of interest as to the alleged misconduct. Without that conflict, the directors would bring the action by the corporation itself and the corporation would possess a right to jury trial for any legal claims. Similarly, if an individual class member brought the same claim as the class action in an individual action, she would have a right to jury trial for any legal claims. The right to jury trial should not differ simply because a shareholder brings a derivative action or an individual brings a class action. Granting derivative and class actions the same jury trial right as if brought individually by the parties represented in those actions, would avoid harming the jury trial rights of the represented parties and ensure equal treatment for the represented parties who are the beneficiaries of those actions.

Attorneys and their clients need certainty to make strategic litigation decisions such as choosing a forum, demanding a jury trial, and assessing settlement. Litigation always faces uncertainty as to how the substantive law will apply to the facts of the case, but the procedural law should be certain. State courts should resolve the uncertainty surrounding the right to jury trial in class and shareholder derivative actions by extending a right to jury trial for legal claims in both actions.